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1947 Cancellation of Contracts

One of the meanest disputes to settle arises out of a falling market when cancellation of contracts becomes epidemic. It is particularly disturbing in post-war international trade when docks and warehouses become jammed with rejected merchandise and when the commodity deteriorates in the face of the dire need of the people in devastated countries. But it is also disturbing because of the resentment, ill will, distrust and antagonism such disturbances create in a world which it seems is already pretty heavily burdened with these feelings. Obviously litigation is no answer to this problem; and just as obviously delay will not help matters. While no process of settling disputes will change the economic conditions which cause the cancellations, they can be ameliorated through the rapid adjustments arbitration is capable of making. When there is a clause in the contract, arbitration may be invoked immediately; when there is none, the persuasion of a neutral agency toward a settlement is very frequently successful. The Inter-American Commercial Arbitration Commission has a Business Relations Committee of 31 men who have settled many such cases; and the AAA is establishing a similar Committee to deal with such problems. Arbitration is not a complete answer, but it may help to save future markets, friendships, good business understanding, and to save some of the profits and commodities now endangered.

Is there a Profession of Arbitrators?

When we speak of lawyers, doctors, engineers, architects, accountants or other professional men, we think of men who have been trained in the fundamentals of an established calling. We think of them as belonging to organizations that set and maintain standards; and of men who meet to discuss the problems of their profession. We think of them as having professional ethics and the kind of pride and belief in their work which gives them a common purpose and a community of interest. We think of the numerous publications that constantly record their views and chart progress and prevent abuses.

When we speak of arbitrators what kind of person appears to us? We know there are men who earn their living acting as arbitrators; we know that, for better or worse, they make decisions which have the power of a judgment of the court; we know that the parties in dispute entrust to them disposal of rights that are apparently of the highest consequence to them. We know that from their decisions there is no appeal.

But we are extremely hazy as to whether an arbitrator is a negotiator, a bargainer, a mediator, a fact finder or a conciliator; we are equally confused as to what his training for this profession may be; we are ignorant of what associations may be influencing him in arriving at his decisions; we are curious as to what standards collectively apply to this new calling.

It is possible that the profession of arbitrator has arrived before it has been possible to discover and apply the principles of his profession, or to train him for the practice of arbitration in which he is now engaged. It is possible that he is only blazing a trail for a new profession. But, in the meantime, what is happening to the thousands of contesting parties, particularly those to collective bargaining agreements, who are providing him with a practice of arbitration by writing provisions in their contracts and who are somewhat blindly trusting to luck that when a dispute arises, by some miracle they will find an impartial, trustworthy person, who without rules or other guidance, will dispense justice and settle their claim speedily and at a cost they can afford? What safeguard has the public against the inexperienced and corruptible arbitrator who is responsible to no one but himself?

If there is to be a profession of arbitrator, isn't it time that the men engaged in its practice should be thinking about building it soundly, cleanly and constructively lest the abuses lead to restrictions and the regimentation that inevitably arise out of malpractice? Isn't it time that in their own interest and in that of the men who trust their rights and property to their decisions that arbitrators themselves take the profession in hand and make it a worthy instrumentality of justice and a highly accredited calling?

We suggest that an Institute of Arbitrators to study and organize a profession of arbitration is in order as a first step toward maintaining full confidence in arbitration.

Special Tribunals in Trade Centers

In the last issue of the JOURNAL attention was called to the Arbitration Tribunal to be established in the Trade Mart in New Orleans. In this issue, attention is directed to the need for a Tribunal in the proposed World Trade Center in New York. This American trend to establish in trade centers, facilities for the settlement of commercial disputes in which tenants and their customers have an interest is in line with the AAA policy to take arbitration to the people and to make its facilities and services conveniently accessible to them in their own environment.

On a Starvation Diet

While arbitration continues its fast pace of development in international commercial and trade relations and tribunals are glutted with the most diverse and intricate problems of settlement of disputes, arbitration among governments seems to be on a starvation diet. Once again the people in private activities are moving far out in advance of their governments.

Does Arbitration take Bread and Butter away from Lawyers?

The assertion that arbitration takes bread and butter away from lawyers is so frequently made that it seems advisable to submit the questions to a closer scrutiny. Let us begin with a fundamental right. It is the natural right of parties in dispute to undertake to settle their own disputes. They may do this by a choice of methods—litigation, arbitration or by force. In this choice of litigation or arbitration, they are entirely free to engage lawyers. It is therefore the opportunity of the lawyer to practice either in the Courts or in the arbitration tribunals. If he chooses to ignore the tribunal, the loss is his responsibility, for arbitrate men will and have since the dawn of civilization.

But suppose the lawyer is not afraid of arbitration, or does not choose to indulge his prejudice, or is not bent upon public litigation for every kind of dispute. He can earn his bread and butter more easily and with the same affluence as if he went to court. He can and does act as an arbitrator and earns a good fee. He can and does go into tribunals, represents his client, prepares and argues his case and receives as good a fee as if he had appeared in court. He has a more satisfied client at a lower overhead cost. He can and does arrange settlements under contracts containing arbitration clauses and gets well paid for his services. He can and does draw up contracts that contain arbi-

tration clauses and he counsels parties on arbitration law and practice for which presumably a fee is charged.

That lawyers recognize in this new practice a worthwhile source of income is evidenced by the fact that more than 80% of the thousands of cases arbitrated in the Tribunals of the American Arbitration Association come from lawyers, in which tribunals they appear on behalf of the parties.

If lawyers are losing any bread and butter because of arbitration, it is because they are not alert to their opportunity, will not take the time or thought to cultivate this practice, or will not lay aside prejudices or misunderstandings concerning it.

One of the most frequent of these misunderstandings is the belief that arbitration is compromise and that there will be no real opportunity to prepare or argue a case. A glance at the Rules of the American Arbitration Association and of the awards and opinions, should conclusively prove to lawyers that their bread and butter is not only not in danger, but is being improved by the practice of arbitration.

The Ever-Changing Scene

The United States. AAA clause adopted in United Nations contracts with American firms. . . . . American Statistical Association plans a High Court of Standards and Appeals "to render opinions and recommendations on controversial issues relating to statistical procedures and the presentation of statistical material." . . . . Senator Elbert D. Thomas of Utah in an address on "The Meaning of Liberty in Industry-Labor Relations," delivered on May 22, 1947 at the University of Washington, in Seattle, says: "All disputes shall be settled by peaceful means." . . . . A Bill (H. R. 2084) has been introduced to codify and enact into positive law Title 9 of the U. S. Code entitled "Arbitration," in force since January 1, 1926.

International. First case goes to International Court of Justice: Great Britain v. Albania, for destruction of British destroyers in Corfu Channel last October. . . . . Conciliation Commission headed by William Phillips, former U. S. Under-Secretary of State, will define border between Siam and Indo China. . . . . Secretary of State Marshall suggested at the recent Moscow Conference on the Treaty with Austria "arbitration machinery to deal with disputes as to application of the agreed definition of status" of German assets in Austria. . . . . Recent treaty between Turkey and Transjordan provides for settlement of all "disagreements which may arise between them by

peaceful means." . . . . Catholic Association for International Peace recommends "the establishment of a judicial system of compulsory jurisdiction over issues arising in the application of laws effectively proscribing international war," and National Catholic Welfare Conference includes in Declaration of Human Rights: "The right to recourse to the procedures of pacific settlement established by the international community for disputes which diplomatic negotiations have failed to settle."

Foreign Trade. London Court of Arbitration examines proposal for standard arbitration clause for British-American trade arbitration. . . . . Bridgeport, Connecticut, Chamber of Commerce has its Foreign Trade Arbitration Committee warn members to use arbitration services. . . . . Shares of Norsk Hydro, Norwegian heavy water manufacturing company, which were taken over from French shareholders during German occupation, were the cause of dispute now settled through compensation to the French. . . . . Proposed International House in Minneapolis will protect twin cities' stake in foreign trade, thus joining New Orleans in establishing International House; as in New Orleans, facilities should be provided for arbitration of foreign trade disputes. . . . . Organization of Mid-Continent Foreign Trade Arbitration Council was recently endorsed by Export Management Club of New Orleans, Foreign Trade Bureau of the New Orleans Association of Commerce and World Trade Development Committee of International House; this project was adopted as "baby" of the Mississippi Valley Foreign Trade Conference, inspired to this action by R. S. Hecht, Chairman of the Board, Mississippi Shipping Company. . . . . First Forum Meeting of National Council of American Importers included arbitration in discussion of the general topic of "Essentials of Agency and Purchase Contracts," and in further meeting the Council adopted resolution arguing incorporation of commercial arbitration provisions in forthcoming commercial treaties following pattern of recent Chinese-American Treaty of Friendship, Commerce and Navigation, now before U. S. Senate Committee on Foreign Relations. . . . . International Air Transport Association adopted arbitration provisions which are reprinted below p. 187. . . . . Mobile Forms Foreign Trade Arbitration Committee to protect commerce and trade passing through the port of Mobile, Alabama, is being formed by a group of outstanding business men. . . . . R. D. McManigal, VicePresident, Westinghouse Electric International Co., in address at meeting of National Industrial

Conference Board on "The Export of American Know-How," stresses necessity that "usual clauses for settling disputes by arbitration or otherwise" should be included in contracts. . . . . Paul B. Halstead, Secretary-Treasurer, General Arbitration Council of the Textile Industry, in a recent article in N. Y. Journal of Commerce, points to the efficient machinery established in the General Arbitration Council, again a valuable aid to the distributor. . . . . AAA International Trade Bulletin #2 carried timely warning on defective arbitration clauses in foreign trade contracts. . . . . Bulletin #3 featured a suggestion for a new type of blanket arbitration clause to cover, in general, transactions contracted for later by cable or other expedited means of communication (see text below p. 133). . . . . Bulletin #4 includes a timely warning to small foreign trade firms.

Settled Disputes. The United States has paid over four million dollars to Swiss citizens on war claims when American planes, in April 1944, bombed the Swiss towns of Schaffhausen and Samaden by mistake. . . . . An accord between French, British and American oil companies ended the controversy on the interpretation of the 1928 Red Line Agreement whereby none of its participants could acquire new oil interests in the Middle East area (which was outlined on a map by a red line) except for the joint account of the partners. . . . . Anglo-Polish financial agreement winds up long-pending controversies on Poland's wartime debts arising out of civilian expenditures incurred in Great Britain by the former Polish Government-in-exile. . . . . Netherlands-United States final settlement of war accounts covers not only lend-lease and reciprocal aid but also a claim of three million dollars for additional compensation for Dutch property requisitioned for war purposes in the United States in 1917 and 1918, during the first World War.

"Growing" Disputes between Great Britain and Egypt out of the proposed withdrawal of British troops and the future status of the Anglo-Egyptian Sudan . . . . the Indian Government's embargo on exports to the Union of South Africa arising out of alleged discrimination of Indian traders in the Transvaal Province.

Said Winston Churchill, in his speech of May 14th, advocating the formation of United Europe: "In my experience of large enterprises, it is often a mistake to try to settle everything at once. Far off, on the skyline, we can see the peaks of the delectable mountains. But we cannot tell what lies between us and

them," and Ambrose Bierce: "International Arbitration may be defined as the substitution of many burning questions for a smoldering one."

The Voice of Arbitration

From the AAA calendar of addresses on arbitration: Rufus Paret, Director of Voluntary Labor Arbitration Tribunals, AAA, addressed on March 21st an audience at Harrison, N. Y. High School on "Arbitration in Labor Disputes." . . . . J. S. Cardinale, Executive Secretary, Inter-American Commercial Arbitration Commission, spoke on "Arbitration in Latin-American Trade" in a radio broadcast to the Latin American Republics sponsored by the Department of State on March 22nd. . . . . J. Noble Braden, Tribunals Vice President, AAA, directed April 9th seminar in case presentation at Yale University Law School. . . . . J. N. Braden again spoke on "Arbitration of Accident Claims" at monthly luncheon of Insurance Claims Managers Council, N. Y. . . . . Walter H. Elliot of AAA Los Angeles Office, spoke before Religion and Labor Council of Los Angeles. . . . . On April 16th, J. S. Cardinale addressed the monthly meeting of the American Office Supply Exporter's Association on "The Use of Arbitration in Foreign Trade." . . . . On May 8th, Martin Domke, International Vice President, AAA, gave a lecture at City College of New York, School of Civic and Business Administration on "Current Trends in American Foreign Trade" with special reference to the settlement of commercial controversies. . . . . On April 28th, J. S. Cardinale also addressed the same group on "Arbitration, an Aid to Foreign Traders," and discussed on March 25th at Forum Meeting of National Council of American Importers inclusion of arbitration clause in agency and purchase contracts. . . . . J. S. Murphy, Director of Panel Administration, AAA, has shown an increased activity in addressing the League of Women Voters in Pelham, N. Y. on April 14th; on April 23rd a Forum in Social Studies Department, St. Peter's College, New York; New York University (Government Club) on April 30th, followed by students' visit to AAA headquarters to attend a hearing; on May 7th, before the City College of New York, on "Arbitration in Labor Disputes," on the occasion of their meeting on the 100th anniversary of the College; on May 9th, J. S. Murphy addressed a class on Labor Problems at Fordham University (School of Adult Education) and at the same University on May 21st a class of the Business School (Downtown Division) on "Arbitration in Collective Bargaining Processes."

R. EMERSON SWART

President of the American Arbitration Association, passed from the scene of arbitration in action on May 7, 1947.

For not quite two years, Mr. Swart carried forward both the spirit and fact of arbitration as a leader in a campaign to make it a greater instrumentality for peace and security for Americans and peoples in many lands. He might have been a Quaker, so gentle and persuasive was his approach to the problems that surround controversy and so profound was his faith in the good in his fellowmen. He was certainly a philosopher in his understanding of mankind and of its needs and in his planning for the general welfare. Disregarding warnings that his span of life might be cut short unless he curbed his zealous spirit in its ceaseless urge to serve, he drove himself relentlessly forward to the very end.

It was his dream that some day the churches would rally to the cause of arbitration as a way to peace on earth and goodwill among men. One of his last acts was to address a group of clergymen on arbitration and he was at work on a message to the church when he died. He thought the church, of all institutions, was the best fitted to carry forward the spirit of arbitration.

Mr. Swart was born in Detroit in 1901. A graduate engineer, he also studied law, and merged the dual professional training in a wide variety of industrial and financial activities. Four years after graduation—with a venture into motor cars as a prelude he was Vice President in charge of underwriting for the investment house of P. W. Chapman. At 29, he was already head of a public utility group. A year later he founded his own investment firm which continued until he assumed his duties as President of Huyler's, Inc. in 1942. He was a Director of several other corporations, including the Southeastern Corporation, Royal Palm Ice Company, the Munson Line, Inc., and Louis Sherry.

In the field of education, Mr. Swart was a Trustee of the American University in Washington, D. C., Drew University, and of the New York Institute of Applied Arts and Sciences, and a member of the Board of Visitors of the New York University Law School.

His civic, political and religious activities were also numerous and varied. He served as Trustee of Goodwill Industries, an institution for assisting the physically handicapped; Director of the Society for the Prevention of Crime; Director of the Protestant Council of New York; member of the Executive Committee of the Board of Managers of the New York City Society of the Methodist Church; and as Treasurer of the New York Republican County Committee.

Arbitration has not had a more devoted and selfless leader, for in his business affairs he put it into practice while he preached it ceaselessly among his friends. It was his profound belief in and practice of arbitration that gave high sincerity and integrity to his leadership, which led older men to follow him and inspired young men to join the ranks.

It may be truly said that Mr. Swart gave his life to the cause in which he came so profoundly to believe. Although he is no longer among us, his courage, enthusiasm and warm sympathy live on to broaden the vision and sharpen the inspiration of those who follow.

A SCIENCE OF ARBITRATION FROM AN INTERNATIONAL VIEWPOINT

FRANCES KELLOR *

The Arbitration Journal publishes in this issue the first chronology of arbitration. It presents for the first time a bird's-eye view of the many diversified steps that have been taken by different organizations and individuals in various fields of activity toward the creation of a science of arbitration. In its simplest terms, such a science is the systematic study and organization of the knowledge and practice of arbitration and the mobilization of human and economic resources for its intelligent advancement.

This chronology, however, reveals little of the policies and principles which have been evolved in the course of events which it presents. Nor does such a chronology present a picture of profound thought or constructive planning. On the contrary, it would seem to indicate haphazard progress in many directions. Such, however, has not been the fact. This is nowhere better illustrated than in international commercial arbitration.

As a foundation for such a science, the Association believed that it must first study arbitration and devise an American system of arbitration as a base for international arbitration; and that facilities and services should be amply provided for the practice of arbitration in the United States before the pattern was extended elsewhere. This was accomplished by 1930. The Association then turned its attention to the organization of its first international system and the extension of the pattern. The establishment of the Inter-American Commercial System followed in 1934; and the Canadian-American System in 1943.

In the meantime, the policy and plan for the extension of this pattern to other countries was taking shape in the form of joint arrangements entered into between the Association and organizations in other countries for the use of a joint arbitration clause placing at the disposal of American and foreign traders

* First Vice President of the American Arbitration Association, Executive Member of the Inter-American Commercial Arbitration Commission, Member of the Canadian-American Commercial Arbitration Commission and American Representative on the Administrative Bureau of the International Commercial Arbitration Committee.

the mutual facilities and administrative services of the cooperating organizations. In itself this plan posed a policy, namely that the Association or other Western Hemisphere organizations do not conceive of a science in which their institutions shall be established in other countries. On the contrary, by mutual arrangements with agencies in other countries, they seek to arouse their interest and cooperation in working out a world trade arbitration system in which many minds in many countries share through their own national instrumentalities.

From the international viewpoint, in the development of a science of arbitration, not theoretically but through research and the establishment of a practice of arbitration, the Association has adopted for its own guidance certain fundamental policies which may be briefly stated as follows:

1. Advancement generally of the knowledge and use of arbitration as an instrumentality for peace and security among peoples and as an aid to governments.

2. Utilization of trade and commercial interests and organizations and economic institutions and agencies as the medium through which the foundations of international peace and security will be strengthened.

3. Coordination of existing systems of commercial arbitration and their supplementation in areas not now covered by such systems, with a view to establishing a coordinated international system of arbitration for the settlement of economic disputes.

4. Establishment of facilities, services and machinery and their administration according to acceptable standards, principles and procedures which will insure fair, expeditious and inexpensive settlement of international trade disputes in all parts of the world.

5. Improvement of arbitration laws in all countries in order that arbitration agreements and awards will be legally enforceable and that courts will lend their aid to their observance and execution.

6. Advancement of education and training in arbitration history, philosophy, principles and practice through the foreign services of governments and institutions of learning, with a view to its better understanding and utilization in the settlement of international controversy.

7. Incorporation of arbitration provisions in international agreements, conventions, treaties and charters, and cooperation

in advancing the implementation of these provisions through procedures, machinery and administration.

8. Advancement of the arbitration provisions of the China-United States Treaty of Friendship, Commerce and Navigation as a model for future treaties to which the United States is a party, giving full faith and credit to arbitration clauses and awards in private arbitrations and encouraging arbitration among peoples as well as governments.

9. Cooperation with the United Nations, and economic agencies established by and in conjunction with it, for the utilization of arbitration in the settlement of disputes arising out of their operations.

In the implementation of these policies, the Association has followed certain fundamental beliefs and has applied definite principles.

It has, for example, frankly recognized the fact that economic controversy is an inevitable and natural element in modern civilization—even as it has been throughout the evolution of man; and that it is a healthening process insofar as it does not escape the control necessary to the freedom, progress and happiness of all peoples.

The Association has accepted the basis of contract as the foundation of its new science. Since most relationships are governed by some form of contract, this has seemed the most logical and stable foundation. And since there seems to attach to contract a high degree of honor, observance of goodwill and good faith, this seemed to offer the best guaranty of peace and security.

Through the network of contract, whether it be between governments or among their peoples, the promise to settle a future dispute amicably, made at the time the contract is made, and before a dispute appears, seems to offer the best guaranty for amicable settlement; hence the encouragement of its use becomes a cardinal principle in such a science. It is the theory of prevention now applied in so many other sciences.

It has seemed, also, that full responsibility should be placed upon those who create disputes to arrange for their settlement; and that individual initiative and resources should be encouraged to the utmost so as to avoid placing too much responsibility upon governments. This principle is exemplified in the arbitration provisions of the pending China-United States Treaty of Friendship, Commerce and Navigation which commits the contracting governments to arbitration and which encourages their nationals

engaged in international trade to settle their commercial disputes by arbitration.

In the concept of a science of arbitration, research and education must have a significant place. So little is known about the areas of tension out of which disputes arise or of the processes by which organized disputes ensue en masse or progress that their study becomes a fundamental in a science of arbitration.

Education in the application of both the spirit and process of arbitration in human relations is on the threshold. Training in schools, colleges and institutions and in foreign offices and in trade groups, in handling controversy through arbitration is, in the Americas, an acknowledged essential.

The furthest landmark in international education was recently established in the creation of four Working Committees to study arbitration on an international plane (see p. 137).

In a world of such different ideologies—where peoples have a high degree of private trade initiative in some countries and a controlled state trading policy in others; and in areas where there is a traditional practice of arbitration, and in others where the word is quite unknown to people, the application of policies and principles, such as those indicated, becomes a matter of education, cooperation and coordination if there is ever to be a dispute-free society in the sense that scientific methods for its prevention, control or direction can be installed with some degree of uniformity throughout the world.

The systematic utilization of goodwill to reduce ill-will; the cultivation of confidence to supplant suspicion; the spread of the doctrine of cooperation to replace competition; and the inculcation of tolerance and understanding are attributes of a science of arbitration.

If, however, a science of arbitration is to accomplish these things in international trade relations, it must be equipped with the machinery, facilities and services which make men and nations familiar with its processes and which make them desire to proceed amicably rather than by force. Such machinery must be readily available, be competent and trustworthy and inspire confidence. It must, by its own competence and integrity, attract nations and men to its standards. It is in pursuance of this objective that systems have been established in 22 countries of the Western Hemisphere and are being extended to other countries. For example, it would be futile to encourage foreign traders to use arbitration clauses and have no machinery available

for the use of the parties thereto should a dispute arise. It will in the future be equally futile to encourage governments to put arbitration provisions in their treaties and not process their foreign officers in the science of adjusting grievances, differences and disputes that may arise under such provisions.

What we are saying is that if international economic controversy is to yield to pacific settlement, it cannot be left to chance, to casual processes and to inexperienced people to adjust or control. To oppose a science of force there must be a science of arbitration; to counteract the formulation of mass or organized controversy, there must be equally intelligent means of discovery and prevention. To bring matters to reason in place of force, there must be a process for doing so that reaches all of the people. This reaching down to the people is important. If they know arbitration, use it in their daily lives, and believe in it, they will influence their governments to use it. If the people are indifferent or ignorant, then governments may ignore it or reduce it to impotence.

The significance of an undertaking to create a science of arbitration should not be underestimated or delayed at this period of world affairs. If arbitration can be brought closer to the people through a wider application of the policies and principles indicated; if available machinery can become world-wide in all areas of tension and of trade; if national foundations of theory and practice can be established in all countries as they have been in the Western Hemisphere in 22 countries; if through cooperation and coordination existing facilities can be consolidated into a world system, by making each one a pillar of support for international peace and security, then the science of arbitration will make headway and peace and security will have found a new base for its support.

It is encouraging that the pattern so broadly designed for the Americas should be making headway on so wide an international front through chambers of commerce and foreign offices, and through provisions in contracts, agreements and treaties. It is significant that the great powers are lending a willing ear through the studies being inaugurated, and through their own foreign offices. It is even more significant that a people's interest is being aroused, for in the last analysis it is their lives, property, trade and happiness that are to be safeguarded from the evils and ravages of disputes. It is in the interest of their welfare that the science is being created.

A CHRONOLOGY OF AMERICAN ARBITRATION

The following chronology of arbitration indicates the diversity of steps that have been taken under American initiative toward the creation of a science of arbitration, and toward the advancement of the organization and knowledge and practice of arbitration as elements of that science.

1920 Enactment of First Modern Arbitration Law—New York State

1922 Organization of the Arbitration Society of America

1923 Enactment of New Jersey Arbitration Law

Organization of arbitration system for the motion picture industry by the Film Boards of Trade

1924 "Arbitration Week." First cooperative effort of 60 leading trade and commercial organizations to promote arbitration

1925 Enactment of United States Arbitration Law

Organization of the Arbitration Foundation, Inc.

Enactment of Massachusetts Arbitration Law

Enactment of Oregon Arbitration Law

Enactment of Territory of Hawaii Arbitration Law

Organization of the "Arbitration Conference" with representatives of trade, commercial and professional organizations

First conference of the Bench, Bar and business leaders to consider joint use of arbitration

First agreement for the administration of arbitrations for an industry made with Actors' Equity for the theatre

1926 Organization of the American Arbitration Association

Creation of the National Panel of Arbitrators

First presentation of arbitration to the Inter-American Conference at Havana, Cuba

Formulation of Draft State Arbitration Act—as a model for modern arbitration laws

1927 Publication of the First Year Book on Commercial Arbitration in the United States

Enactment of California Arbitration Law

Initiation of Inter-American arbitration celebrated by luncheon in New York to the President of Cuba

Adoption of the Association's standard arbitration clause by the New York furniture moving and warehouse industry through the New York Furniture Warehousemen's Association

1928 AAA commences Survey of State Arbitration Laws under fellowship presented to leading universities

First Arbitration Conference at the University of Virginia

Publication of *Suggestions for Practice of Commercial Arbitration*

Enactment of Louisiana Arbitration Law

Enactment of Pennsylvania Arbitration Law

Publication of Handbooks on foreign arbitration laws by joint arrangement with the International Chamber of Commerce

Publication of the *International Year Book on Civil and Commercial Arbitration*

Agreement for the administration of arbitration for an industry made with the American Fur Merchants Association and the Fur Brokers Association

1929 Enactment of Arizona Arbitration Law

Enactment of Connecticut Arbitration Law

Enactment of New Hampshire Arbitration Law

Enactment of Rhode Island Arbitration Law

1930 Publication of *A Treatise on Commercial Arbitrations and Awards* by Professor Wesley A. Sturges of the Yale Law School

Adoption of standard arbitration clause and agreement for arbitration under AAA Rules for the cloth and garment trades by the Wool Institute (now the National Association of Wool Manufacturers), Industrial Council of the Cloak, Suit & Skirt Manufacturers, Merchants Ladies Garment Association, New York Clothing Manufacturers Exchange, Textile Shrinkers Association and Textile Adjusters Association

1931 Publication of First *Code of Arbitration Practice and Procedure*

Enactment of Wisconsin Arbitration Law

Enactment of Ohio Arbitration Law

1932 Establishment of joint service by the AAA and the American Chamber of Commerce in London

1933 Survey conducted in Inter-American arbitration in 21 Republics

Accident Claims Tribunal Established

1934 Establishment of the Inter-American Commercial Arbitration Commission

Over one hundred Codes of Fair Competition adopted under the National Industrial Recovery Act provide for use of arbitration for settlement of disputes between seller and buyer and for the settlement of disputes involving self-regulation under the Codes

City Court of the City of New York has general calendar call and urges arbitration be used to settle cases that cannot be tried for two and a half years

Special Panel of Arbitrators appointed in cooperation with the several Bar Association of the City to relieve congested court calendars

1935 First use of arbitration to determine the fairness of a reorganization plan on a $3,000,000.00 defaulted real estate bond issue

The Dental professional and trade organizations agree to submit all disputes to arbitration under AAA Rules

Joseph P. Kennedy, Chairman of The Security and Exchange Commission, announces at an AAA luncheon an eleven point program for changes in Stock Exchange procedure, including recommendation of impartial arbitration of disputes between customers and brokers

Council on Trade Agreements submits plan for voluntary self regulation of industry with use of arbitration as judicial part of some regulations

Committee on arbitration appointed by the Bar Association of the City of New York

1936 Observance of Tenth Anniversary of the Association

American Bankers Association approves modern arbitration law in its recommended program for state legislation

The Accountants Institute and the American Society of Certified Public Accountants merge and adopt a program for arbitration

1937 Voluntary Labor Arbitration Tribunal established

American Institute of Architects adopt new arbitration procedure for Standard Building Contracts and provide for administration by the AAA

First publication of *Arbitration Journal*

1938 First course in Arbitration Law given by New York University Law School

1939 Arrangement for joint Arbitration Clause with the International Chamber of Commerce

Establishment of Arbitration Plan for Air Transport Industry

Participation in World Trade Center at New York World's Fair

1940 Consent Decree established facilities for Motion Picture Arbitration System in thirty-one cities in the United States

Establishment of Inter-American Business Relations Committee

Arbitration Year in the Americas

1941 Survey of Canadian Arbitration Law and Facilities

Establishment of American Defense Fund and promotion of use of arbitration clause in munitions contracts

Opening of thirty-one Motion Picture Tribunals to Labor and Commercial Arbitration affecting War Production

Use of AAA Clause by British, Canadian, Australian and Amtorg Purchasing Missions

Symposiums on Arbitration Conducted by the Association of the Bar of the City of New York

Publication of *Arbitration in Action*

1942 Accident Claims Tribunal references of cases reaches the 12,000 mark

Arbitration machinery expanded for war time use in the Americas

Canadian-American survey of law completed as basis for Canadian-American System

1943 Canadian-American Commercial Arbitration Commission organized

First Western Hemisphere Conference on Foreign Trade and Arbitration held in New York

Monthly magazine on Arbitration published

1944 Bureau of Labor Statistics reports that 75% of collective bargaining agreements in leading industries in the country provide for arbitration as the terminal point in grievance machinery

Publication of *Arbitration in International Controversy*

Membership of National Panel of Arbitrators reaches 10,000

1945 Publication of *International Arbitration Journal*

First In-Service Course for Teachers held at AAA

First Course in Industrial Arbitration given by the Graduate School of Business Administration, New York University

Five million dollar controversy submitted under AAA Rules by foreign government and an American supplier of armaments

1946 AAA arbitration clauses in collective bargaining agreements in the textile industry exceed 400

International Commercial Arbitration Day held during International Week in New Orleans

Participation in Conference on International Commercial Arbitration in Paris

Publication of *Code of Ethics for Arbitrators*

Chinese-American Trade Arbitration Commission established

Course in Arbitration Law given at Yale Law School

ROLE OF THE NEW WORLD COURT IN INTERNATIONAL ARBITRATION

KENNETH S. CARLSTON *

Some important unfinished business concerning the former Permanent Court of International Justice remains for consideration in respect of the present International Court of Justice. What shall be its role in relation to *ad hoc* arbitration tribunals established between States? Shall a system of appeal be established to cover instances in which their awards are charged to be vitiated by excess of jurisdiction or fundamental fault in procedure? Shall review be established to correct error of law?

These and similar problems were considered during the years 1928 to 1931 by the League of Nations and some definite conclusions were reached. It seems generally admitted that the present system of leaving claims of nullity of international arbitral awards to regulation by the parties is most unsatisfactory. It has been criticized as anarchic, war provoking and tending to create doubt in the authority of international tribunals. It is a door which the dissatisfied litigant may be only too prone to open as a means of escape from its obligations under the award.

A special committee of the Council of the League made a report on this question on September 8, 1930, which the Council forwarded to the Assembly for consideration. Under this report, a party charging nullity of an arbitral award was declared to be under an obligation to submit its claim to the Permanent Court of International Justice. It was required to take this step within sixty days from the notification of the award. The Court could declare the award void, in whole or in part, and could order appropriate provisional measures. Its decision would be binding upon the parties.[1]

Upon annulment, the parties were considered to be replaced

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[1] League of Nations, Official Journal Vol. 11 (1919), pp. 86, 101, 1301, 1359, 1362.

in their prior legal position, but this principle was later refined in the First Committee of the Assembly to the proposal that the Court was to decide whether and in what measure the award was defective and, only insofar as the award was declared to be vitiated by the defects alleged, would the parties be permitted to treat the award as not binding.[2]

Various means to implement the obligation of States to submit their charges of nullity to the Court were suggested, including a draft protocol to such effect [3] and a recommendation that the Assembly formally declare the existence of such an obligation.[4] The First Committee of the Assembly recommended in addition that the Council of the League should intervene in such cases and request the parties to submit their dispute to the Court for decision and, failing in this effort, the Council should itself ask the Court for an advisory opinion. The First Committee would also empower the party affected by a charge of nullity made by another independently to bring the case before the Court if the complaining party failed to do so.[5]

Some basic principles accordingly suggest themselves as a guide for future progress in this direction.

1. An appropriate body within the United Nations, such as the Committee on the Development of International Law and its Codification, should prepare a draft clause for inclusion in bipartite arbitration agreements which would recognize the competence of the International Court of Justice to entertain claims of nullity of arbitral awards and to determine the extent to which they are well founded under the principles of international law. Such a clause should provide that if the party contesting the validity of an award should fail within a specified time to bring its charges before the Court, the other party could do so independently.

2. The system of appeal should be limited to cases of nullity, such as excess of jurisdiction or fundamental fault in procedure, rather than the correction of mere mistake in law. It is desirable to proceed step by step in this connection, and the intricate problems of dealing with error *in judicando* should be deferred until

[2] League of Nations, Official Journal (Special Supplement No. 94), Records of the Twelfth Ordinary Session of the League of Nations, Minutes of the First Committee (1931) pp. 59, 140.

[3] *Supra* note 1 at p. 1363.

[4] *Ibid.* at p. 1364.

[5] *Supra* note 2.

the more urgent problem of regulating claims of nullity has been met.

3. The authority of the Court, at this time, should be limited to a judgment upon the claims of nullity; it should not be authorized to enter a new judgment in accordance with its views of the applicable law. This will avoid placing the arbitral tribunal affected in what might seem to be an inferior position and preserve the prestige, dignity and value of the present system of arbitration.

4. The Assembly should affirm the existence of an obligation on a party contesting the validity of an arbitral award to submit its claims to judicial regulation, preferably by the International Court of Justice, instead of unilaterally refusing to carry out its obligations under the contested award.

Measures of this nature would go far towards removing a real weakness of the present system of international arbitration, the privilege of a party to assert the invalidity of an award and yet to refrain from submitting its claims of nullity to judicial determination.

Under Article 33 of the Charter of the United Nations it is stated that in the event of a dispute the parties thereto shall "first of all, seek a solution by . . . . arbitration . . . . or other peaceful means of their own choice." The encouragement of the process of arbitration for the solution of international controversy marked by this article is already evidenced in the provisions concerning the settlement of disputes in the proposed first five peace treaties with Italy and the four Axis satellite powers. The so-called Conciliation Commissions established under them are essentially tribunals of arbitration.[6] In view of the increase in resort to the method of arbitration for the settlement of international controversy of which these provisions are prophetic, an early order of business for the new International Court of Justice is the expansion of its jurisdiction along the lines marked out in 1931 for its predecessor.

[6] E. g., Treaty with Italy, Art. 83; Treaty with Hungary, Art. 35.

NEW PROBLEMS IN INTERNATIONAL CIVIL AVIATION ARBITRAL PROCEDURE

JOHN C. COOPER *

The Convention on International Civil Aviation, signed at the Chicago Conference of 1944 became effective on April 4, 1947. As pointed out by Dr. Domke two years ago,[1] "arbitration won its first major entrance into the field of inter-governmental conventions when it was adopted" by the Chicago Conference and incorporated in the permanent Convention, the Transit and Transport Agreements, and the Interim Agreement.

Chapter XVIII of the permanent Convention, which has now come into force, contains the provisions described by Dr. Domke under which States which are parties to the Convention have agreed to an arbitral procedure including two processes of settlement: one by executive decision of the Council set up under the Convention; and the other by appeal from Council decisions to an *ad hoc* arbitral tribunal, or to the Permanent Court of International Justice. The disagreements to be settled under this procedure are limited to those "between two or more contracting States relating to the interpretation or application" of the Convention or its Annexes. The Council to which recourse must first be had is composed of twenty-one elected States sitting (through duly appointed representatives) between meetings of the Assembly of the International Civil Aviation Organization ICAO), created by the Convention, and vested with general powers of executive control of the organization. Although the procedure adopted at Chicago has just become effective, its usefulness has already been challenged. However, the decision to use some kind of arbitration procedure has been affirmed.

At the first meeting of the Assembly of the new International Civil Aviation Organization held at Montreal May 6-27, 1947, a proposed new "Multilateral Agreement on Commercial Rights in International Civil Air Transport" was presented for consideration. The purpose of this proposed agreement was to provide for the exchange of both Transit and Transport rights, the

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[1] Domke, Martin: "International Civil Aviation Sets New Pattern," *International Arbitration Journal*, April 1945, Vol. 1, No. 1, pp. 20-29.

all-important subject on which no final understanding was reached at Chicago in 1944. In preparing the new draft agreement the Air Transport Committee of the provisional organization, which had been functioning in Montreal for two years, seemingly concluded that the Council of the Organization was not the best form for settlement of disputes. The draft agreement was accordingly submitted to the Assembly containing the following arbitral provisions:

> "Art. 17 (a) Any disagreement arising between contracting States on the interpretation or application of this Agreement, which cannot be settled by negotiation, shall be resolved by an arbitral tribunal, the members of which shall be appointed by the President of the Council of the International Civil Aviation Organization. The method of selecting members of such arbitral tribunal and the conduct of their proceedings shall be governed by rules as established by the Council.
>
> "(b) If, upon the application of any contracting State as to a matter covered by Article 8 or Article 14 of this Agreement, the President of the Council of the International Civil Aviation Organization, on evidence submitted, shall be of the opinion that a temporary restraining order is required, he may issue such order. The order of the President shall remain in effect until the decision of the arbitral tribunal comes into force, unless sooner modified or revoked by him.
>
> "(c) Contracting States shall conform to decisions of such tribunal and orders of the President, and shall require their airlines to conform thereto. If an airline of any contracting State fails to conform to any such decision or order, each other contracting State undertakes not to allow the operation of such airline through the airspace above its territory until such time as the airline is acting in conformity to such decision or order."

In the official Commentary submitted to the Assembly with the draft agreement, the following explanation appeared:

> "The need for some effective agency to interpret and enforce the Agreement is obvious in view of its deliberate generality and flexibility. Such interpretation is best left to a proper tribunal; enforcement is achieved through adequate sanctions for the decisions of the tribunal.
>
> Four main alternative methods of dealing with disagreements were considered as follows:
>
> to give the Council of ICAO power to render binding decisions in somewhat the same manner as is now provided by Chapter XVIII of the Convention.
>
> to give the Council merely advisory powers of decision.
>
> to provide for arbitral tribunals with binding powers.
>
> to provide for a permanent tribunal within ICAO.

"The first alternative was rejected because of the belief that the Council, while well suited to serve as a legislative body is, by its very nature, improperly suited to be competent as a judicial body. It is a Council of States. The individuals who serve as representatives on the Council are necessarily subject to instructions in casting the votes of their respective States. Accordingly, the final vote on a judicial question pending in the Council might easily be merely a summing up of the political forces currently operating in the twenty-one States represented. It seems unlikely that the Council will be any more able than a national legislative body to establish a clear line of precedents, to follow precedents once established, or to act generally in a judicial manner.

"Although there was some support for the appointment of a permanent tribunal within the Organization this was deemed inadvisable because of the expense involved and the unpredictable volume of litigation. In this connection it was recalled that, although several bilateral agreements provide for application to the Council of PICAO for advisory report in case of dispute, no such applications have as yet been made.

"To give the Council advisory powers only was deemed to combine several of the objections to the Council's acting at all in a judicial capacity, with a further objection that the Council's decision once rendered would not be enforceable.

"Appointment of a tribunal with power to render binding decisions was deemed necessary, since it seemed unlikely that any State would grant the rights conferred by the Agreement without more protection than an advisory decision. The objections above recited to the use of existing or contemplated permanent agencies did not seem to apply to *ad hoc* arbitral tribunals. Appointment of such tribunals with binding powers was accordingly deemed the best solution. By providing that all members of the tribunal are selected by the President of the Council, the objection is avoided that arbitral tribunals often consist of two advocates (the nominees of the respective parties) and one judge (the third member selected by the other two). The provision of a power in the President of the Interim Council to make temporary restraining orders was deemed a necessary complement in view of the inevitable delays in convening a special tribunal and trying a controversy before it.

"It will be observed that, although Article 17 (c) requires contracting States to conform to decisions and orders, the sanctions provided apply only to airlines of contracting States which fail to conform thereto. The Committee believed that it was preferable, on the whole, to rely on the undertaking of States to abide by the decisions without seeking to impose sanctions against the States themselves in case of violation."

When the draft agreement was being considered by the Assembly, two important amendments were offered, one by the United States, the other by the United Kingdom. Neither indicated a desire to use the arbitral procedure in the Convention.

The procedure suggested by the United States was as follows:

> "(a) If any disagreement shall arise between contracting States with respect to the interpretation or application of this Agreement, it shall be the duty of such States to use their best efforts to settle such disagreements by negotiation. If such disagreement cannot be settled by negotiation, it shall be submitted for an advisory opinion to an arbitral tribunal consisting of one arbitrator designated by each party to the disagreement plus at least one additional arbitrator, or as many more as are necessary to avoid having an even number of arbitrators on the tribunal. Within thirty days after the conclusion of the negotiations, the parties to the disagreement shall each designate an arbitrator, and within thirty days after such designation the arbitrators so designated shall select the additional arbitrator or arbitrators by unanimous vote. If the arbitrators designated by the parties shall fail to name the additional arbitrator or arbitrators within such time, or if one or more of the parties shall fail to name within such time the arbitrator that it is entitled to name, such arbitrators shall be named by the President of the Council of the International Civil Aviation Organization from a panel of arbitrators to be established by that Council; provided, however, that any arbitrator or arbitrators appointed as a result of the failure of the parties to agree upon such arbitrator or arbitrators shall not be of the same nationality as any of the parties to the disagreement.
>
> "(b) Any such arbitral tribunal may act by majority vote. The conduct of the arbitration proceedings before such tribunal shall be governed by rules established by the Council which rules shall permit any contracting State to present to the arbitral tribunal in writing views and evidence relating to the subject of disagreement. A *modus vivendi* pending the opinion of the arbitral tribunal shall be determined by negotiation between the parties to the disagreement.
>
> "(c) The executive authorities of the contracting States will use their best efforts under the powers available to them to put into effect the recommendations contained in any such advisory opinion."

The United Kingdom's chief representative did not suggest actual amendatory language. He did, however, make it clear that the United Kingdom view called for a special tribunal identified with ICAO, but not formed from it; also that such a tribunal must be both impartial and expert. A tribunal was then suggested in which the president should be "an international jurist of distinction" and the two other members to be experts chosen from a panel.

No final action on the draft agreement was taken at the Montreal Assembly. The entire question of the adoption of a new multilateral agreement was postponed for later action at a special conference which will probably meet in October. At that time the arbitral problem must be considered along with other unsettled questions.

The chief difficulty, in the view of the present writer, is this—the permanent convention covers many complicated problems of international air navigation, and the proposed multilateral agreement will be merely supplementary. The latter will provide, it is hoped, a definite "set of rules" under which international scheduled air transport operations may be conducted between member States, supplanting the maze of special agreements now exisiting. If such a multilateral agreement is signed, it will exist side by side with the permanent Convention. But the arbitral procedure provided in the Convention, described so adequately by Dr. Domke in the *International Arbitration Journal* article mentioned above, is quite different from the various schemes proposed for the multilateral agreement. The procedure set up in the Convention must be used in disputes arising under the Convention and the new procedure contemplated by the draft multilateral agreement must be used in disputes under that agreement. In many foreseeable cases, so closely is the subject matter of the Convention and the draft agreement interwoven, it will be extremely difficult to determine which procedure should be used. This may produce serious legal and political questions. It would seem much simpler to provide in the new multilateral agreement for use of the arbitral procedure provided by the Convention. Then, if necessary, the Convention could be later amended if its arbitral procedure is not considered satisfactory.

The Assembly, before adjournment, did take one constructive step in furthering the use of arbitration in international aviation disputes. It adopted the following resolution giving the Council temporary power to act in any dispute even though not arising from an interpretation of the Convention:

> "WHEREAS the Interim Agreement on International Civil Aviation provides, under Article III, Section 6(8), that one of the functions of the Council shall be:
>
> 'When expressly requested by all the parties concerned, act as an arbitral body on any differences arising, among Member States relating to international civil aviation matters which may be submitted to it. The Council may render an advisory report or, if the parties concerned so expressly decide, they may obligate themselves in advance to accept the decision of the Council. The procedure to govern the arbitral proceedings shall be determined in agreement between the Council and all the interested parties.'
>
> "WHEREAS the Convention on International Civil Aviation contains no such provision and the competence of the Council of the Organization, in the settlement of disputes as accorded to it by Article 84 of

the Convention, is limited to decisions on disagreements relating to the interpretation or application of the Convention and its Annexes,

"*Now Therefore* the First Assembly resolves:

(1) that pending further discussion and ultimate decision by the Organization as to the methods of dealing with international disputes in the field of civil aviation, the Council be authorized and directed to act as an arbitral body on any differences arising among Contracting States relating to international civil aviation matters submitted to it, when expressly requested to do so by all parties to such differences; and

(2) that the Council, on such occasions, be authorized to render an advisory report, or a decision binding upon the parties, if the parties expressly decide to obligate themselves in advance to accept the decision of the Council as binding; and

(3) that the procedure to govern the arbitral procedures shall be determined in agreement between the Council and all the interested parties."

The use of arbitration to settle international disputes in civil aviation seems fortunately to be fully affirmed by this Resolution. The only question now remaining is a final decision as to future procedure.

NEWS AND NOTES

Permanent Court of Arbitration. "Arbitration in International Controversy," a pamphlet published in November 1944, suggested a careful analysis of the procedures and administration of the Permanent Court of Arbitration with a view "to making recommendations for its reorganization and adaptation to postwar requirements in the field of both public and private controversy and its possible reconstruction as a universal system of arbitration." Such reform is also considered by Professor Kenneth S. Carlston, author of "The Process of Arbitration," in an article published elsewhere in this issue. Numerous treaty provisions refer to that Court; though primarily concluded between European countries, they also involve some Latin American Republics, as it appears from the recently published list (as of November 1, 1946). The Report of the Administrative Council for the 45th year includes a survey of all cases which since 1902 have been handled by the permanent Court of Arbitration. Judge Algot S. Bagge, President of the Court of Arbitration of the International Chamber of Commerce, has just been appointed a member of the Court.

Arbitration in Allocation of German Reparation Assets. The Inter-Allied Reparations Agency in Brussels, established to ensure an equitable distribution of German reparations among the eighteen member nations entitled to such allocation under the Paris Agreement of January 14, 1946, consists of an Assembly comprising a representative of each signatory government and an international Secretariat. Its First Report for 1946 makes known the Rules of the Agency as of December 31, 1946 which provide in Chapter VII (Appeal from Decisions of the Assembly) a procedure for the arbitral determination of controversies relating to the allocation of reparation items. These arbitration Rules are reprinted p. 187.

International Bank for Reconstruction and Development. The Articles of Agreement of this international body, signed in 1944 at the Bretton Woods Conference, provide that disagreements between the Bank and withdrawing members or during the permanent suspension of the Bank "shall be submitted to arbitration by a tribunal of three arbitrators, one appointed by the Bank, another by the country involved, and an umpire who, unless the parties otherwise agree, shall be appointed by the President of the Permanent Court of International Justice or such other authority as may have been prescribed by regulation adopted by the Bank. The umpire shall have full power to settle all question of procedure in any case where the parties are in disagreement with respect thereto" (art. IXc). The By-Laws, as approved by the Board of Governors at the First Annual Meeting, provide in Sec. 22 (Settlement of Disagreements): "The President of the International Court of Justice is prescribed as the authority to appoint an umpire whenever there arises a disagreement of the type referred to in Article IX(c) of the Articles of Agreement." Corresponding provisions are found in Art. XVIII(c) of the Articles of Agreement on the International Monetary Fund and in Sec. 23 of its By-Laws.

Air Transport Agreements. The development of civil aviation requires the speedy settlement of controversies on the interpretation or application of international agreements which might otherwise endanger peaceful economic developments. Thus, bilateral agreements, concluded in the recent past by the United States with thirty-four countries, provide that such differences shall be submitted for an advisory report to the Council of the Interna-

tional Civil Aviation Organization in Montreal which came into existence as a permanent organization on April 4, 1947, after twenty-six nations had deposited their instruments of ratification. Sometimes, as in the agreements with Peru and with Ecuador, reference is also made to an arbitration tribunal designated by mutual agreement between the parties. The recent agreement with Syria signed at Damascus on April 28, 1947, provides in Article 10 that "Any dispute between the contracting parties relating to the interpretation or application of this Agreement or its Annex which cannot be settled through consultation shall be referred for an advisory report to the Council of the International Civil Aviation Organization." Provisions for such report are embodied in the Organization's Rules governing the Settlement of Differences between States, art. 15(2) and 21, to be reprinted in the next issue of this *Journal*.

The Food and Agricultural Organization of the United Nations, after meeting the emergency needs of many countries, will have to establish appropriate machinery and rules of procedure for the settlement of disputes. Art. XVII of its Constitution already adopted the principle that controversies on its interpretation and disputes arising out of international conventions should be referred to an international court "or arbitral tribunal in the manner prescribed by rules to be adopted by the Conference." These provisions require an implementation by procedures similar to those as were established in the International Civil Aviation Organization.

Civil Liability of United States in Operation of Military Bases in Philippines. The recent agreement between the United States and the Republic of the Philippines relating to cooperation in the mutual defense of their territories provides in Art. XXIII, as to claims, the following: "For the purpose of promoting and maintaining friendly relations by the prompt settlement of meritorious claims, the United States shall pay just and reasonable compensation, when accepted by claimants in full satisfaction and in final settlement of claims, including claims of insured but excluding claims of subrogees, on account of damage to or loss or destruction of private property, both real and personal, or personal injury or death of inhabitants of the Philippine Islands, when such damage, loss, destruction or injury is caused by the Armed Forces of the United States, or individual members

thereof, including military or civilian employees thereof, or otherwise incident to non-combat activities of such forces; provided that no claim shall be considered unless presented within one year after the occurrence of the accident or incident out of which such claim arises."

United Nations Educational, Scientific and Cultural Organization. Its Constitution provides in Art. XIV (Interpretation): "Any question or dispute concerning the interpretation of this Constitution shall be referred for determination to the International Court of Justice or to an arbitral tribunal, as the General Conference may determine under its rules of procedure." Thus, provision has been made for recourse to arbitral tribunals, as it was likewise done in Art. 95 of the Charter of the United Nations which reserves the right to entrust differences of the members to tribunals "by virtue of agreements already in existence or which may be concluded in the future."

The Vienna "Arbitration." Sometimes misuse is made of the term "award" when arbitrary and not arbitral decisions are imposed upon a party by unilateral determination clothed in the form of an arbitration procedure. This was the case with the Vienna Award of November 2, 1938 whereby in a German-Italian arbitration, held in Vienna under the Munich Agreement Hungary was accorded some Czechoslovakian territory. The decisions of the "award" were solemnly repudiated in 1942 by Great Britain and France, the other participants of the Munich Agreement, have now been expressly declared "null and void" in the Peace Treaty with Hungary of February 10, 1947, article 1 (4a).

Arbitration Commissions in Indonesia. The Cheribon Agreement between The Netherlands Government and the Republic of Indonesia, formally signed on March 29, 1947, provides in Article XIV for the establishment of a Joint Commission to determine the claims of non-Indonesians to the restoration of their rights and the restitution of their goods. The first step to restore foreign-owned property to their rightful owners was recently taken with respect to a textile factory in East Java which belongs to Nebritex, a joint Netherlands-British enterprise.

The Cheribon Agreement moreover provides in its art. XVII (b) that the two Governments "shall settle by arbitration

any dispute which might arise from the agreement and which cannot be solved by joint consultation in conference (between the permanent delegations to be appointed by each of the two Governments). In that case a chairman of another nationality with a deciding vote shall be appointed by agreement between the delegations or, if such agreement cannot be reached, by the President of the International Court of Justice."

WORLD TRADE CENTER SHOULD INCLUDE A COURT OF ARBITRATION

FRANK R. SCHELL *

The recent announcement by the World Trade Corporation that it wants to spend 275 million dollars to improve the dock and shipping facilities of the port of New York, is a good illustration of the old adage: "great oaks from little acorns grow." Born at a luncheon of three people in the Florida building at the New York World's Fair in 1939, this corporation has apparently reached manhood very quickly.

The intermediate steps taken to bring it into being are of little interest except to those who made them; but they reached their culmination when the New York State Legislature created the corporation by special act in 1946 and appropriated $100,000 for the use of its board of directors, which the act authorized the Governor to appoint.

Believing in the idea that world peace could be promoted through world trade, the originators conceived a modern, streamlined version of the Leipzig Fair (the oldest business organization on earth, having recently celebrated its 600th birthday) where all nations could exhibit their raw materials and finished products and where all transactions incident to their purchase, financing and shipment could be consummated.

The first site selected by former Mayor La Guardia was between 42nd and 50th Streets, 9th and 10th Avenues, with an approach between 45th and 47th Streets extending from 8th to 9th Avenues, on Manhattan Island. Due to the almost prohibitive cost of acquiring this location, consideration was given to several places on Long Island, including the old New York World's Fair grounds on Flushing Meadows.

The Board of Directors of the World Trade Corporation consisting of nine outstanding banking, business and political leaders, headed by Winthrop Aldrich, Chairman of the Board of Directors of the Chase National Bank of New York, appointed

* Public Relations Consultant.

by Governor Dewey; after a year's study has expanded the conception of the founders to include the improvement of the dock and shipping facilities of the port of New York and the modernization of the Washington Market.

The location of the World Trade Center itself has not yet been definitely determined, but it would seem that New York City, the hub of world trade, is the only logical place to put it.

Promoting world peace through world trade naturally implies that such world trade itself must be peaceful. The World Trade Center should therefore include a Court of Arbitration and all contracts between buyers and sellers concluded at the Center should contain a clause that all disputes shall be settled by arbitration.

The advantages of referring all disputes to an impartial board of arbitration are no where more apparent than in international trade. Then neither buyer nor seller has to rely for justice on a court of a foreign nation, with whose laws, customs and procedures he is not familiar; but both can rest their case with an impartial board of arbitration, uninfluenced by political considerations and governed only by common business practice and common sense. This procedure is even more important for the small exporter, represented in a foreign country merely by an agent, who does not wish to take sides in any dispute and thereby antagonize either the buyer or the seller.

Such a Court of Arbitration might well be housed in a central shrine in the World Trade Center, dedicated to the war dead of all nations. The same building dedicated to the memory of those who died to settle international disputes by force of arms and housing an international Court of Arbitration, by its very contrast, would be a beacon of intelligence shining through the fog of international misunderstanding pointing the way to the settlement of all international arguments by peaceful arbitration and thereby laying the foundations for permanent peace.

NOTE: Provision is being made in the New Orleans Trade Mart for the American Arbitration Association and the Inter-American Commercial Arbitration Commission to operate an arbitration tribunal for the benefit of tenant traders and their clients (ED.).

NEWS AND NOTES

International Trade Organization. The Arbitration Journal mentioned in its last issue on p. 29 the proposals which the American Arbitration Association had made at the Hearing of the Executive Committee on Economic Foreign Policy held in New York, namely, to amend Article 86(2) of the Draft-Charter. It was proposed to provide for an appeal from any ruling of the Executive Board of the International Trade Organization to an *ad hoc* arbitration tribunal which shall be composed of arbitrators selected by the parties from lists of qualified persons. Thus, controversies concerning the interpretation of the Charter or arising out of its operation would be settled within the framework of the Organization, and what the President of the United States recently said in his address at Baylor University in Waco, Texas could be achieved: "If the nations can agree to observe a code of good conduct in international trade, they will cooperate more readily in other international affairs. Such agreement will prevent the bitterness that is engendered by an economic war. It will provide an atmosphere congenial to the preservation of the peace."

Meanwhile, the International Chamber of Commerce, in a report of April 1, 1947 (Document No. 7831) entitled "Trade and Employment" reviewing the Draft-Charter, made the following interesting comments and suggestions:

"The International Chamber of Commerce, noting with interest and approval that the last paragraph of the New York Drafting Committee's General Comments on Article 86 refers the subject of arbitration to the Second Session of the Preparatory Committee as a 'substantive matter of the highest importance,' urges the Second Session to give the most careful consideration to the problem of designing a uniform procedure for interpretation, conciliation and arbitration. The I.C.C. firmly believes that the projected Organization will prove to be unworkable, if this problem is not solved.

In the present version of the Charter, Article 86 contains specific provisions for interpretation and for the settlement of disputes. In addition, a great variety of provisions is found scattered throughout the Charter to deal with disputes arising out of the provisions of the Charter on specific points. In the opinion of the I.C.C., in so far as special circumstances do not call for a special procedure, all provisions for interpretation, conciliation

and arbitration should be removed from the body of the Charter and assembled in a distinct chapter or article. This would considerably simplify the terms of the Charter and facilitate the efficient operation of the Organization.

The International Chamber of Commerce suggests that the following points should be specifically covered by the new chapter or article:

1. As far as the interpretation of terms in the Charter capable of quasi-legal treatment is concerned, the I.C.C. believes that article 86 already provides an adequate procedure.
2. As regards differences of a non-justiciable nature (in other words matters of fact or opinion arising out of the use of terms throughout the Charter, such as 'unreasonable,' 'undue,' 'excessive,' 'harmful,' etc. . . . .), the I.C.C. is of the opinion that neither the optional intervention of the Organization, provided for in many places in the Charter, nor the system of rulings by the Executive Board envisaged in article 86, is a suitable method of approach. The I.C.C. suggests that a machinery of conciliation and arbitration should be set up comprising three distinct stages of action:
   a) the Organization should be *under an obligation* to make recommendation to members in circumstances where it has reason to believe that differences or disputes of this kind are likely to arise;
   b) when a complaint or a dispute actually occurs, the Organization should be *under an obligation* to provide its good offices for purposes of conciliation;
   c) Members should undertake, in case conciliation fails, to submit disputes to an arbitration tribunal *external* to the Organization."

Philippine-American Trade Arbitration Commission. The personnel of the American and Philippine Sections of the Philippine-American Trade Arbitration Commission has been completed. The Chamber of Commerce of the Philippines has appointed the members of the Philippine Section with Gil J. Puyat as Chairman. The American Arbitration Association has appointed the American Section with J. W. Haussermann as Chairman. An agreement and rules of procedure are now being prepared for approval. In the meantime both Sections have agreed to the use of the following temporary arbitration clause so that current

disputes can be promptly settled: "Any controversy or claim arising out of or relating to this contract, or breach thereof, shall be settled by arbitration in accordance with the Rules, then obtaining, of the Philippine-American Trade Arbitration Commission. If for any reason the arbitration cannot be conducted under the Rules of said Commission, then the arbitration shall be held under the Rules of the American Arbitration Association, which shall apply them in whatever locality the parties have designated for their arbitration."

Exporter-Supplier Relationship. Safeguarding exports from disputes often begins too late with an arbitration clause in the export contract. It should begin with the exporter's contract with his supplier of merchandise. It is this negligence that places an undue and often undesired burden upon the exporter who must in the eyes of the trader in other countries be responsible. As it is not practicable for an exporter to inspect every shipment, he must take the rap for any dispute. When suppliers receive payment, pleas of an exporter to back up their legitimate claims often fall on stony ground. Exporters will save themselves endless trouble by using an arbitration clause in exporter-supplier contracts.

New Arbitration Contract Overcomes Difficulties. The American Arbitration Association has been aware for some time of the difficulty foreign traders have encountered in applying an arbitration clause to their different foreign trade transactions. Most dealings are the result of an exchange of cables or letters. Under these circumstances, there is no contract or agreement in which the aribtration clause can be used. The following new contract is proposed to overcome this difficulty. Comments on the draft contract before its final adoption will be welcome.

> *Whereas,* the parties hereto are presently engaged in various business transactions and relationships and are presently arranging to continue and further such transactions and relationships in their mutual interests; and
>
> *Whereas,* some or all of the business transactions and relationships between the parties are or may be pursuant to oral agreements and understandings or various written agreements not containing arbitration clauses; and
>
> *Whereas,* the parties are desirous of having all questions

and disputes arising between them in connection with their various business transactions and relationships settled by arbitration;

Now, Therefore, it is mutually agreed as follows:

First: The parties agree that they will submit to arbitration under the rules then obtaining of the American Arbitration Association any claims, disputes or controversies of any kind or nature that may arise out of or relating to any and all commercial agreements or transactions or business relationships now or hereafter to be undertaken between the parties within two (2) years from the date hereof.

Second: The terms of this agreement shall be deemed a part of and incorporated by reference in any and all present and subsequent commercial agreements or transactions, written or oral, entered into by and between the parties hereto within two (2) years from the date hereof, unless such agreements or transactions contain or are subject to specific written mutually acceptable provisions to the contrary.

Third: This agreement shall be enforceable and judgment upon any award rendered pursuant hereto may be entered in any court having jurisdiction thereof.

United States Foreign Trade Board has been suggested as a change of the name of the U. S. Tariff Commission. A proposal to vest additional authority in the Board was made by Senator Brewster (Congressional Record of May 14, 1947 p. 5397), in stressing the need for review of the foreign commercial policy of the United States. One of the duties of the U. S. Foreign Trade Board would be to submit recommendations "respecting such changes and adjustments in law, regulation, or procedure as in its opinion may be necessary to achieve the aims set forth" with respect to the foreign commercial activities of the United States. The settlement of disputes in trade relations with foreign countries and especially the use of arbitral procedure may be one of the measures which the Board may wish to consider.

Protection of American-Foreign Lending and Investment. The importance of international capital investment as a means of promoting economic developments has long been recognized. Supplying dollars for the reconstruction and rehabilitation of wide areas of the world may, however, entail controversies which

have to be settled speedily to avoid endangering good relations. It is for that reason that leading business organizations of this country have long favored the establishment of international machinery for the settlement of disputes arising out of loan contracts and international investment. Suggestions for a Code of Fair Practice for International Investment, as made by the United States Associates, International Chamber of Commerce, included the establishment of arbitration machinery; they were reprinted in the spring issue of this *Journal* p. 47. More recently, the National Association of Manufacturers favored the inclusion of a Code of Fair Practices Governing Foreign Investments in the proposed Charter for an International Trade Organization. There it was said, with regard to the settlement of disputes: "At present the machinery for dealing with controversies in connection with international loans and investments is entirely unsatisfactory. An international organization is needed as a repository of information, as a fact-finding body in case of disputes, and as a medium for conciliation and arbitration. This international body should review and finally determine international financial controversies among the nationals of the States which accept its jurisdiction, so as definitely to cancel debts which cannot be paid and re-establish on a current basis those debts which can and should be paid."

Some Typical International Disputes received by AAA.

From the Philippines: A Philippine merchant placed an order with a California exporter for the purchase of 16 bales of percale and poplin remnants, the specifications calling for an average of four yards to a pound of cloth. When the merchandise arrived at Manila, an inspection revealed that instead of percale and poplin remnants, the merchandise received consisted of sack cloth suitable only for curtains, as the average yardage was only one yard to the pound. The Philippine importer requested reimbursement for the difference in specifications and referred the matter to the AAA. The Association communicated with the California exporter, submitting to him copies of surveys that had been made of the cloth received and after an exchange of correspondence, the matter was brought to an amicable adjustment whereby the U. S. firm transmitted to the Philippine company the sum of $3,000 reimbursement.

From India: A New York firm placed an order with an Indian merchant for the purchase of 10,000 pickled sheepskins valued at $12,000. Upon arrival, an inspection made by the purchaser revealed that approximately 60% were not fit for use. The contract of purchase contained the AAA arbitration clause and as a result a demand for arbitration was served. The arbitration was held in Wilmington, Delaware, where the skins were stored, and was attended by both the importer and the New York representative of the Indian firm. The arbitrator found that the skins had been improperly pickled in India, and consequently awarded the sum of $3,500 to the importing firm. It is interesting to note that this matter was settled within 85 days after delivery of the merchandise.

From India, another case: A Bombay firm purchased a quantity of spectacle frames of specified color against a letter of credit. It claims that the merchandise received did not comply with color requirements suitable for resale in India. A surveyor's report indicates that complaining firm's claims be justified.

From China: An important export and import firm in Shanghai presents a claim against an American firm for nondelivery of merchandise. It is claimed only a small portion of diversified commodities were actually received, and after agreeing upon the price an increase was demanded by the American firm. The customers of the Chinese house refused to pay any increase and, therefore, the Shanghai firm suffers "loss of face," a serious matter to Chinese business men.

From Italy: An American firm purchased raw silk from an Italian exporter against letter of credit. Upon receipt of the shipment it was found that the quality was below standard. It appears that the arbitration clause, printed in Italian, on the confirmation of the order received from Italy, provides for arbitration of any dispute before three arbitrators selected under arbitration rules of a pre-war Italian Federation no longer in existence. The American firm never having had any previous difficulty with the Italian exporter failed to take the trouble to question the arbitration clause and have it altered to conform with postwar circumstances.

International Law Association. The forthcoming Conference to be held at Prague, Czechoslovakia, in September 1947 has "Commercial Arbitration" as one of its subjects for discussion as pro-

posed by the Executive Council. The Committee on Commercial Arbitration to which Martin Domke, International Vice President, American Arbitration Association, and Phanor J. Eder, Chairman, Law Committee of Inter-American Commercial Arbitration Commission, were recently appointed, will probably prepare a report as a basis for discussion.

International Commercial Arbitration Committee

The International Chamber of Commerce took a long step forward in making arbitration better understood when it called a Conference on International Commercial Arbitration in June of 1946, and subsequently established an International Commercial Arbitration Committee with an administrative Bureau in Paris. Its organizers and member organizations are:

The International Chamber of Commerce
The London Court of Arbitration
The International Institute for the Unification of Private Law
The International Law Association
The Foreign Trade Arbitration Commission and Maritime Arbitration Commission, All-Union Chamber of Commerce
The American Arbitration Association
The Inter-American Commercial Arbitration Commission
The Canadian-American Commercial Arbitration Commission

There are now being established four Working Committees:

1. Committee for the Unification of the Law on Arbitration and the Enforcement of Arbitral Awards
2. Committee for the Coordination of Arbitration Systems
3. Committee on Arbitration between Governments and Individuals
4. Committee on Arbitration Education

These Comittees will devote their studies toward a better understanding of international commercial arbitration. The organization, development and financing of the studies for the Committee for the Coordination of Arbitration Systems and the Committee on Arbitration Education have been assigned to the Western Hemisphere members of the Committee.

Morris S. Rosenthal representing the Inter-American Commercial Arbitration Commission and Frances Kellor representing the American Arbitration Association have been appointed members of the Administrative Bureau.

Martin Domke, International Vice President, American Arbitration Association, has been appointed the representative of the Association on the Committee for the Unification of Law on Arbitration and the Enforcement of Arbitral Awards, and Archie O. Dawson, a member of the Board of Directors, American Arbitration Association, will represent the Association on the Committee on Arbitration between Governments and Individuals.

A BUSINESSMAN LOOKS AT ARBITRATION

MORRIS S. ROSENTHAL *

When two companies enter into business relations involving the exchange of goods or services, the chief objective of both is the continuity of their relationship on a mutually profitable basis. A company rarely buys or sells from another company or enters into service relationships with another company on the basis of a single transaction. Companies that sell goods or services are eager for and need the goodwill of their customers over the years. Companies that buy goods or services are eager for and need the goodwill and continuity of their sources of supply. That is axiomatic and fundamental in the operations of any business enterprise.

Contracts are used to set forth the details pertaining to purchases and sales. They should never be viewed as legalistic documents in a vacuum. Contracts are intended to and should cover those things that the seller and buyer undertake to do for each other and those things that they expect from each other. For that reason contracts should be simply and clearly drawn.

But no matter how good the initial intent of both parties to a transaction may be, and no matter how clearly and simply a contract may be drawn, there will inevitably be disagreements between seller and buyer as to the interpretation of their obligations toward each other. It is therefore of great importance to both parties to a contract that they arrive in advance at an agreement as to how they can compose and settle their differences without affecting their friendly relations, so that they may continue doing business with each other and thereby profit from their established business relationship.

There are, broadly speaking, two methods of settling such differences if the two parties cannot agree by themselves. One is litigation in the courts of law. The other is arbitration. In my early years of business I had the opportunity of observing lawsuits and the results thereof in business relationships when there were many contractual difficulties arising out of the depression of 1921. And I learned at that time, that no matter how well the

* President, National Council of American Importers, Inc.

courts might function, law suits inevitably tended to result in the termination of business relationships. During the passing years I have had the opportunity of observing arbitrations, both as an arbitrator and as a disputant. From the sum total of these experiences, both in courts of law and in arbitration procedures, I believe that arbitration does much for the businessman that a lawsuit cannot do. And I feel that the more thoroughly businessmen understand not only the simple mechanism of arbitration but also the psychological effect of the arbitration procedure, the more they will resort to arbitration as a method of settling their business disagreements instead of suing each other.

First, there is the matter of speed of settlement. Our American courts, County, State, and Federal, are badly congested. Frequently it can take from one to two years to have a case heard in the lower courts. Thereafter there can be one or more appeals to higher courts. From the time that one litigant hails another into court until the final adjudication of a case, several years can elapse. I recall one important case involving an interpretation of foreign trade terms that started in 1920 and was finally determined by the United States Supreme Court in 1928.

Inevitably both parties tend to discontinue doing business with each other while a case is being dragged on and thereby both may well lose valuable business connections. The passion for vindication and the deep feeling that each is right tends to mount with the passage of time, thereby increasing the feeling of animosity that each has toward the other. Contrasted with long drawn out lawsuits is the speed of arbitration, by which a case can be settled within a matter of weeks.

Our company recently had a difference with another company. An arbitration clause had been incorporated in the contract of purchase, and the case was submitted to the American Arbitration Association. Within two weeks the American Arbitration Association sent each party a panel-list of about twenty-five prospective arbiters qualified to serve on a foreign trade case. Each side eliminated those whom it did not wish and indicated its order of choice of those whom it was willing to have serve. From those approved by both sides, the Association quickly chose a panel of three. A hearing was held a short time later, and in less than two months from the time of submission, an award was made. Neither party had time for anger to mount. A friendly relationship was maintained to which the speed of settlement contributed greatly.

There are other advantages of such speed of adjudication. If a case lasts a long time, the party that wins may well find that the losing party is no longer in a financial position to pay the judgment. When the quality of goods is under dispute, the goods can be disposed of sooner if a settlement between the two parties is arrived at quickly. There is less tendency for inventories involving disputed goods to become frozen.

The second important advantage of commercial arbitration is economy to both of the litigating parties. Even though both parties employ counsel to present their cases, the cost to both is usually less in an arbitration procedure than in court trials and for the appeals from the verdicts in lower courts.

Thirdly, I think that there is an advantage in having businessmen, versed in the type of merchandise and in the character of the business involved, examine the facts of a disagreement instead of having a case tried by a jury, which may be well versed in many phases of our economic life but which may be completely ignorant of the considerations involved in the particular dispute. In addition to the many individual trade associations that have arbitration panels, the American Arbitration Association has a broad national panel composed of thousands of men active in all phases of our national economy. Hence, one or three arbitrators, whose experience and background qualify them to render an award based upon the actual happenings and trade custom, can be chosen for an individual case. And as our Federal Arbitration Law as well as the arbitration laws of many states are drawn, both parties to the dispute are assured that the arbitrators will pay proper attention to any legal citations introduced by either side.

Lastly, cases that come before the courts frequently produce a great deal of publicity, thereby heightening the personal feelings of the parties to dispute. An arbitration procedure is conducted without the publicity attendant upon cases in the courts and thus enjoys an atmosphere in which friendliness can be maintained and in which the parties need not become bitterly embroiled.

As a result of my experiences as an arbitrator and as a party to disputes in cases in which our company has both won and lost awards, I feel that arbitrations result in just and legal awards. Even though we have occasional disagreements with our customers and with our sources of supply, their settlement by arbitration has enabled us to preserve pleasant relationships and lasting goodwill.

SETTLEMENT OF REAL ESTATE DISPUTES

MORTON R. CROSS *

There is one consideration in every real estate transaction that is overlooked, and that is the possibility of a dispute and the loss that may be incurred thereby. Some little time ago, a property was surveyed and purchased for remodelling. The reconstruction work was under way when some changes in personnel in the office of the general contractor selected to do the work and some other unforeseen contingencies brought about a controversy. The contractor demanded extras; the owner claimed overpayment on the work done. A deadlock ensued. The subcontractors and material suppliers filed liens. Nine or ten different parties were now in the midst of what appeared to be a substantial litigation, and, of course, a long delay in bringing the property to a rental basis. Fortunately however, an arbitration clause had been included in the general contract and by reference in the subcontracts. A demand for arbitration was made, three arbitrators were appointed, all parties were brought into the proceeding and, after a few days of hearing, an award was rendered. All this was accomplished in the short space of thirty days. The building then proceeded, and the date established for the beginning of rentals was kept.

Leases often entered into for stores on the basis of minimum rentals plus a percentage of profits lead to disputes after the first year based on a misunderstanding of the customs of the trade. Here again the presence of an arbitration clause in the lease providing that any difference between the landlord and tenant would be arbitrated brings a quick solution to the difficulty.

These are but two of many instances in which arbitration may be of service in the real estate industry. Of utmost importance, however, is the type of arbitration clause used. It must provide for every contingency. Time limits must be fixed so that there will be no delays in the prompt settlement of a controversy. It is impossible to include all such provisions in a single clause to be used in a contract. It has therefore become the practice to provide for arbitration under definite rules of procedure, and the

* President, Cross & Brown Company.

rules of the American Arbitration Association, the only organization in the field of arbitration, are most frequently used. These rules guarantee the prompt selection of impartial arbitrators, a hearing on five days' notice and the award within thirty days.

The real estate boards of the country have long provided for arbitration and have undoubtedly done excellent service in the determination of disputes between their members. But there is considerable reluctance on the part of others to submit differences to the trade organization of one of the parties. Even among members of a trade organization there is frequently concern that if a claim is made against one of the better known and larger firms, the prestige and influence may affect the judgment of the arbitration committee. Many of the boards follow a custom and, in effect, provide in their rules that each party to a controversy shall name an arbitrator. That is not arbitration. It is an open invitation to compromise.

When a third arbitrator is appointed, he is, in the majority of cases, a completely impartial person with the result that the first two arbitrators become advocates and urge the contention of the parties that selected them. The third arbitrator has to compromise his own judgment in many cases, which in the final analysis is a compromise decision.

If three arbitrators are desired they should be selected from a panel of men by a disinterested Tribunal. In a controversy between the owner and a contractor, such as has been described above, the arbitrators might probably be selected as follows: one an architect; one a builder; one a real estate broker. By providing for the use of an organization representative of all trades and professions, the parties are assured of securing any type or combination of arbitrators that the organization believes will best solve all controversies.

Two years ago, when the State Legislature of New York enacted the Business and Commercial Rent Law, the value and importance of arbitration to real estate was given substantial recognition. The law provided for the use of arbitration as one of the principal means by which owners and their tenants may settle disputes as to rental values and related questions. The statute provides that when an owner believes that the ceiling rent of 15% above the levels of March 1, 1943, in wholesale loft and manufacturing space, or 15% above June 1, 1944, in the case of stores and offices, is inadequate, he may agree with his tenant to submit the question of his right to charge a higher rent to arbitration.

Many have availed themselves of this privilege, and arbitrators selected because of their knowledge and ability to understand real estate, investment, accounting and the problems of both landlord and tenant have quickly disposed of such controversies. When the law was amended after its first year, the necessity for impartial arbitrators was recognised, and the statute was amended to provide that no person might act as an arbitrator who, directly or indirectly, was in any way connected or associated in interests or otherwise with the landlord or the tenant. Such provision has been included in the arbitration rules of the American Arbitration Association since the first rules were adopted. In addition, the Association assures impartial arbitrators through the high standards fixed for membership on the National Panel of Arbitrators and by its requirement that every arbitrator serving in a case certify under his own signature that he qualifies under the rules.

A number of years ago, when many real estate bond issues were in default, arbitration was brought into service in that field. Any one familiar with real estate and banking will recall the delays, expense and waste that were prevalent in the reorganization of bond issues and the dissatisfaction generally experienced. After a consideration of the matter it was suggested that any plan for the readjustment or reorganization of bond issues should provide that the proposed plan be submitted to impartial arbitrators to determine whether it was a fair and equitable adjustment. The following is a clause used in a reorganization plan of some years ago:

> "Any plan of readjustment or reorganization shall be adopted, amended and/or put into effect only after it has been submitted to and, after a hearing, has been approved by a board of arbitrators; and said board shall have the power to alter, modify or amend any such plan in any manner it may deem advisable before approving same.
>
> "All arbitrators shall be appointed by the American Arbitration Association in accordance with, and all arbitration shall be conducted under, its special Deposit Agreement Rules, then obtaining, to be administered by the American Arbitration Association. The award of a board of arbitrators, or a majority thereof, shall in every instance be final and binding on parties to this agreement and on all parties participating in the arbitration, and a judgment of the highest court, state or federal, having jurisdiction may be entered thereon.
>
> "Insofar as the provisions of this Article are inconsistent with the terms and provisions of any Article hereof, the terms and provisions of this Article shall control."

Under this clause, three arbitrators were appointed, one a banker, one a real estate expert and the other the head of an investment house thoroughly familiar with every type of security and bond issue. These men met and heard the arguments pro and con of bondholders and their attorneys. They had independent appraisals made of the real estate and the furnishings and had estimates made of the rental possibilities. These were submitted to the bondholders and checked with similar estimates and appraisals made by the Committees. Based upon a keen business appraisal of all the facts, the plan proposed was modified, and a new plan of reorganization was awarded by the arbitrators.

These several instances are but a few of the many phases of real estate transactions in which arbitration may be used. For, in addition to the disputes between landlord and tenant, owner and builder and owner and bondholders, there are the disputes that may arise between buyer and seller, owner and broker, broker and broker, and owner and management agent. In every instance where an agreement is made, an arbitration clause may be used, and the parties thus insure themselves of the prompt settlement of any dispute that may thereafter arise. It is an established fact that, where arbitration clauses are in general use, disputes disappear. With the knowledge that any controversy will be speedily determined, by experts, a party is reluctant to bring a claim to the attention of such experts unless it is a bona fide dispute. Even in those instances, with the knowledge that it will be determined within a few weeks, the parties generally get together and settle their controversy. An arbitration clause is not alone an insurance against long, drawn out litigation; it is an evidence and preserver of goodwill.

NEWS AND NOTES

Commercial Arbitration on the Increase. More than 300% increase is the figure for commercial arbitrations in the tribunals of the American Arbitration Association during the first five months of 1947, as against the corresponding period of 1946. The increase is not only in number of cases, especially in woolen contracts, but also in size and importance. The largest award rendered during these months involved approximately $2,000,000.

Such increase of trade disputes is also noted in other organizations administering arbitration procedures. The Arbitration

Bureau of the National Federation of Textiles reports the growing number of disputes between converters and weavers of gray goods on special types of rayon fabrics, and of all types of fabrics from rayon-cotton blends to high-priced silks. The same trend has been noted by the General Arbitration Council of the Textile Industry, which handles principally cotton and allied goods contracts cases.

The Textile Distributors Institute, the trade body representing the major portion of New York up-town converters, reports many amicable settlements have been reached, sometimes in cases where the party had already initiated an arbitration procedure before the agencies designated in textile contracts for the settlement of disputes.

The creation of intertrade arbitration panels composed of members of the retail and ready-to-wear trades was recently suggested to the National Retail Dry Goods Association by the vendors' relations committee of that organization. The proposed intertrade arbitration panels, to be established in the major market cities of the United States, would deal equitably with controversies arising as a result of delayed deliveries, unwarranted cancellations and other causes of friction.

Transcripts of Arbitration Procedures in New York Rental Disputes Necessary. The Emergency Rent Laws, first enacted in 1945, and since amended, provided for the determination of a reasonable rent based on the fair rental value of the tenant's commercial space, not only by ordinary court action but also by arbitration. The arbitration statute (art. 84 Civil Practice Act) has been declared applicable to such procedure, and the arbitration provision has recently been amended (Chapter 822 and 823 of the Laws of 1947) to safeguard the proper use of arbitral procedures. The provision of sec. 16 reads as follows: "Neither the oath of any arbitrator, nor any hearing provided for under such an article shall be waived, nor shall any person act as any such arbitrator who directly or indirectly in any way shall be connected or associated, in interest or otherwise, with the landlord or the tenant, and no arbitration agreement shall be submitted to the Supreme Court unless the application be accompanied by an affidavit of the arbitrator or arbitrators showing strict compliance with this requirement and by a transcript of the minutes of such hearing."

Wider Scope for Arbitration Statutes. The recently adopted Amendment of the 1943 Arbitration Statute of the State of Washington (Bill 328 of March 19, 1947) permits parties to employer-employee agreements, to specify "any method of procedure for the settlement of existing or future disputes and controversies" and provides that such procedure "shall be valid, enforceable and irrevocable." A pending bill in the Illinois General Assembly proposes an amendment of the State Arbitration Law to make valid and enforceable a provision in any written contract to settle by arbitration any controversy then existing or thereafter arising from such contract. Another Bill, pending in Pennsylvania (S. B. 98), extends specifically the present provisions of the Arbitration Law to apply to collective bargaining agreements. It further extends the provisions for confirming awards into court judgments, to cover awards in all types of arbitrations, rather than limiting, as heretofore, to awards in cases that could have been subject to "action in law." Arbitration bills are pending in the State legislatures of Tennessee and Missouri, both important foreign trade centers, providing for the enforceability of agreements to arbitrate future disputes and in general to modernize the statutory provisions for arbitration.

Indian Claims of the Sioux Reservations in South Dakota will soon be submitted to settlement by the new Indian Claims Commission, the members of which were recently nominated by the President. These claims, among them the so-called Wounded Knee Claim, Old-Age Relief Liens, and the Black Hills Claim, are described more in detail in a letter by the attorney for the Sioux Nation, reprinted in Congressional Record 1947 Appendix 1385.

Arbitration of Hospital Bills has been introduced in the State of New York as an amendment to the Workmen's Compensation Law, by Chapter 638 of April 5, 1947, reading as follows: "If the parties fail to agree as to the value of hospital care rendered under this chapter to an injured employee within the State of New York, such value shall be determined by an arbitration committee consisting of two persons designated by the president of the Hospital Association of New York State and two physicians who are members of the Medical Society of the State of New York, designated by the employer or insurance carrier. The majority decision of any such committee shall be conclusive upon the parties as to the value of the care rendered. In the event of

equal division, the chairman of the Workmen's Compensation Board shall appoint a fifth arbitrator as an additional member of the committee who may consider the matter in controversy on the record or require a rehearing before the entire committee. The decision of such fifth arbitrator shall be conclusive on the parties, provided, however, that in the event of a rehearing the majority decision of the committee shall be conclusive."

Arbitration Intelligence. One of the reasons why arbitration has not achieved world-wide use may be that a broad intelligence upon arbitral issues, opportunities, practice and awards has not yet been developed. It might be appropriate to quote from a recent Congressional Report the following: "Intelligence, which is probably a poor word, consists in extracting facts from numerous sources, either through regular, routine reporting on specified subjects, or events of a particular character, or through a special investigation. The facts must be carefully checked to insure accuracy, must be analyzed and collated from the point of view of the use to which they are to be put, and must then be disseminated to those agencies and individuals who need the information in the formulation of decisions and policies in the conduct of their operations. It is obvious that speed is important to avoid receiving the information after it has become stale."

Accident Claim Arbitrated. 20 people plunged to their death in 1944 when a bus broke through a guard rail of a bridge over the Passaic River in New Jersey. Newspapers strongly urged that the various claims arising from that accident be handled in a manner patterned after the arbitration of the circus fire in Hartford, Conn. The president of the Bar Association of Passaic County appointed a committee headed by a judge which persevered for a year to get arbitration procedure adopted by all parties concerned. Three members of the Bar sitting as an arbitration tribunal without compensation are hearing the case. This procedure is very much commended by the Herald-News of Passaic, New Jersey, under a headline "Congratulations to Members of Bar."

COMMERCIAL ARBITRATION IN CHILE

EDUARDO DAGNINO *

The Supreme Court of Justice of Chile has ruled that an arbitration clause which attempts to designate the arbitrator without specifying his name is not valid. Such is the case in the following designation: "The Chamber of Commerce of ————" or "The President of the Association ————." In effect, Article 234 of the Law of Organization and Jurisdiction of the Courts provides that the nomination, under penalty of nullity, must indicate the name of the arbitrator or arbitrators. As a logical consequence, a juridical person cannot be designated as an arbitrator but the names of one or more of the officers who belong to it can be specified to form an arbitration commission. Naturally, a clause is valid which specifies that a dispute "shall be determined by an arbitrator designated by the parties or by the courts in the event of their disagreement."

The decisions of foreign arbitration or ordinary tribunals cannot be executed in Chile if they have been rendered in default (Article 245 Code of Civil Procedure).

The award of an arbitration tribunal of a foreign country will not be enforced in Chile if, in the country where it was rendered, the arbitration awards of Chilean tribunals will not be enforced (Article 244 of the Code of Civil Procedure).

Article 319 of the Code of International Private Law which Chile and various other American countries have adopted prohibits a reference of decisions concerning disputes to arbitration tribunals of other countries since it only authorizes the submission to ordinary courts. This disposition is a law in Chile and in the other countries which have adopted the aforementioned Code. This treaty would be applicable to the arbitration awards of countries which adhere to the same Code, in accordance with Article 242 of the Chilean Code of Civil Procedure.

* Secretary, Chilean National Committee, Inter-American Commercial Arbitration Commission.

Though arbitration clauses in use in Chile are of various contents, they frequently conform to the following elements:

(a) The agreement to refer to arbitration all differences that may arise from the application of the contract.

(b) The specification of the qualification (calidad) of the arbitrator. In Chile there are three types of arbitrators: (1) a *de jure* arbitrator—necessarily a lawyer who considers and rules on a basis of law; (2) the *de facto* arbitrator (arbitrador) who decides the matter in the simplest possible form and in accordance with equity; (3) the arbitrator with mixed character who proceeds as a *de facto* arbitrator and renders the award on the basis of law. Generally, in commercial contracts, there is provided an arbitrador or *de facto* arbitrator as indicated in par. 2.

(c) The designation of the arbitrator. The decision to which I referred has declared null and void the indefinite designation of an institute or of a president of it, so that in the majority of cases there will be designated various persons one as a substitute for the other but there are numerous contracts in which there is named a commercial institute; under the Chilean law, already cited, the enforcement of the clause depends upon the good faith of the parties. Sometimes, the designation of an arbitrator is left until the time in which the dispute arises. If, in such a case, there is no agreement between the parties, the arbitrator will be named by the judge.

(d) The waiver of legal recourse, especially that of appeal and cassation. Generally there is used the phrase "that the award shall be final and without any other recourse." This is, in many cases, the only reference which is made to rules of procedure. It is understood that the waiver of recourse to cassation does not include that of the cause of action called "ultrapetita," that is that which is involved in cases where the arbitrator extends the award to questions which were not submitted to him. In any event, there can be undertaken also an action of compliance (recurso de queja) in order to correct obvious mistakes of an arbitrator.

There is no recourse from awards of *de jure* or *de facto* arbitrators to cassation; this is a procedure which is interposed for a violation on the merits (en el fondo), of substantive law.

There only remains to be examined the possibility that residents of Chile might agree to an arbitration clause which submits their differences to an arbitration tribunal in a foreign country. Article 80 of the Political Constitution and Article 1 of the

Organic Law of Tribunals (in almost identical text) provide that "the power to accept jurisdiction over a civil or criminal action, to judge them and to execute the judgment belong exclusively to the tribunals which the law establishes." But this only signifies that no person or institute can take unto itself in Chile judicial competence (atribucion) if the law specifically does not provide so. In the case of arbitral awards, the law itself authorizes such possibilities.

No law prohibits that contracting residents in different regions of the country submit voluntarily their private disputes to tribunals of another region, unless it be against public policy. On the contrary, it is customary frequently for one to submit himself to the jurisdiction of a tribunal in a city where he has no domicile or residence. In the same way, no law prohibits that contracting parties with residence in different states expressly submit their future differences to the decision of the ordinary tribunals or one of another country, following the conventional domicil in such country. Article 318 of the Bustamente Code of Private International Law expressly permits it.

But when it is a matter of submitting to arbitration tribunals of other countries, there arises a difficulty: Article 319 of the Bustamente Code provides that the submission to a tribunal of another country can only be made with reference to ordinary judges. It therefore results that the solution of a controversy cannot be submitted to arbitrators of other countries. Such a rule would be obligatory in all the states which have adopted the Bustamente Code and would imply a serious obstacle for an Inter-American system of commercial arbitration. The Pan American Union in Washington could elaborate further on the scope and objective of this provision whose modification is somewhat difficult in view of its character of an international convention.

Summarizing, in order to arrive at an Inter-American system of arbitration on the basis of permanent concessions which do not interfere with the judicial system of our country, the following may be suggested:

(a) a change of Article 234 of the Organic Code of Tribunals which would allow the designation as arbitrators of commissions or juridical persons or the presidents of institutions without designation of names of individuals;

(b) a clarification or modification of Article 319 of the Busta-

mente Code in order to permit the submission to foreign arbitration tribunals.

The Chilean Associations and the President of the Bar Association in Santiago have pointed to one of the great difficulties of the system proposed by the Inter-American Commercial Arbitration Commission, that is to say, the location in New York of the majority of arbitrations by the will of the parties expressed in the contract. The defense of a lawsuit outside of the country is difficult and onerous. The President of the Bar Association has explained that important North American purchasers and sellers may demand that the arbitration take place in their own country; then the other contracting party would find itself in a somewhat disadvantageous position. It is clear therefore that the will of the parties should govern in order to avoid doubt and delays. But this should not be left only to the decision of one of the contracting parties. It therefore becomes necessary to develop general rules of competence, on the basis of legal norms most universally accepted (domicile of the defendant, place of the making of the contract, etc.) which would supplement the silence of the parties or which would permit them to orientate or support their decision to fix, at the moment of the making of the contract, the place of arbitration.

NEWS AND NOTES

The Business Relations Committee of the Inter-American Commercial Arbitration Commission expanded its activities during the past months with a view to adjusting speedily differences which may threaten good Inter-American relations. Among the new members of the Committee are: Edward Beattie, National Association of Importers of Hides and Skins; Francis J. Cross, Bronx Chamber of Commerce; E. H. Gaither, Machinery Metals Export Club; Christopher de Groot, Argentine-American Chamber of Commerce; H. F. Heron, Newark Chamber of Commerce; Jean V. Koree, Cuban Chamber of Commerce; Fred Leighton, Mexican Chamber of Commerce; Henry C. Maher, Colombian American Chamber of Commerce; Frank Mason, American Office Supply Exporter's Association; Paul E. Moss, Overseas Automotive Club; Thomas J. Watson, Jr., International Business Machines Corporation; Col. Albert Welsh, Brooklyn Chamber of Commerce.

Thomas J. Watson, Chairman of Inter-American Commercial Arbitration Commission, recently received the medal for merit. The President of the International Business Machines Corporation was praised by the Secretary of War in the citation accompanying the award for "exceptionally meritorious conduct in the performance of outstanding services to the United States throughout the period of the recent war."

Inter-American Coffee Agreement. The Inter-American Coffee Agreement of 1940 extended to September 30, 1947 by ratification of March 7, 1947, will be reviewed by coffee experts for future recommendations. (An article by John K. Havemeyer in Department of State Bulletin Vol. 16, No. 400 discusses the background and present status of this agreement and its operation). Though not establishing rules for the settlement of controversies, the Agreement provides that the controlling authority, the Inter-American Coffee Board, "shall decide whether any infringement of the agreement has taken place, and, if so, what measures shall be recommended to correct the situation arising therefrom."

New York Export Firm Advertises Arbitration. A new departure in arbitration affairs is to be found in the following advertisement by a New York export firm: "As proof of our sincere desire to satisfy our clients and in order to promote friendship and goodwill among the American Republics and to insure that all legitimate complaints are submitted to an impartial judgment, we agree in advance that any controversy or claim which is not settled amicably between the parties shall be submitted to arbitration for a decision in accordance with the rules of the Inter-American Commercial Arbitration Commission then obtaining at the time the dispute is submitted."

Purchase of Brazilian Rice Surpluses. An Agreement between the United States of America and Brazil (Treaties and other International Act Series 1517) provided in its Principal Provisions of Purchase Contracts that "any questions arising under the contract, unless otherwise resolved, are to be settled by arbitration in New Orleans in accordance with the Rules of the New Orleans Board of Trade, or in New York in accordance with the Rules of the New York Produce Exchange."

Banks Aid Customers on Cancellation Disputes. The Banking Committee of the Inter-American Commercial Arbitration Com-

mission representing 43 leading banks in the United States has undertaken a campaign to have banks advise their customers of the necessity of using a standard arbitration clause in contracts and order forms to combat the risk of cancellation and refusal of merchandise already shipped. Among the active banks are: Manufacturers National Bank of Detroit; Mercantile-Commerce Bank of St. Louis; National City Bank of New York; American National Bank and Trust Company of Chicago; National City Bank of Cleveland; First National Bank of Houston; First National Bank in St. Louis; Continental Bank and Trust Company of New York City and the Bank of the Manhattan Company, New York City.

Latin American Chambers of Commerce. In nearly all Latin American countries arbitration of domestic and foreign trade disputes has long been practiced in Chambers of Commerce. An article by Don Jose Rovira Armengol, published in this *Journal* 1946 p. 399, described the procedure under specific rules of arbitration. In this regard, it may be mentioned that a decree of the President of the Republic of Ecuador, of May 8, 1946, established Rules of Procedure of the Arbitration and Claims Commission of the Chamber of Commerce of Guayaquil, Ecuador. As these Rules may be considered as a standard procedure for the settlement of differences between members of the Chambers and between the members and businessmen not affiliated with the Chamber either in Ecuador or abroad, the full text of the Rules is printed on p. 188 of this *Journal.*

Increase in Inter-American Adjustments and Arbitrations. Claims submitted to the Inter-American Commercial Arbitration Commission have more than doubled in the first five months of 1947, over the corresponding period in 1946.

Causes of arbitration controversies were as follows: Quality claims accounted for 46 per cent of the total; failure to pay, 13 per cent; commissions and agents, 11 per cent; failure to accept merchandise, 10 per cent; failure to ship goods contracted for, 10 per cent; insurance and overcharge, 7 per cent, and cancellations 2 per cent. These claims were made against United States traders as well as against traders abroad. The danger that must be watched in the near future is the cancellation category despite the fact that it accounts for a low percentage of claims. There is no way of knowing how many of the quality and failure to com-

plete transaction cases are due to efforts by traders to avoid buying goods in a declining market.

New grounds for disputes between foreign traders are appearing, due to disagreement over the quality of goods shipped, failure to pay for shipments, failure to accept merchandise and cancellations of orders. All these categories cover types of disagreement that were practically non-existent in the immediate post-war period, when foreign buyers were accepting any merchandise they could obtain.

INTER-AMERICAN TRADE ADJUSTMENTS AND AWARDS

Distinction between "Marca" and "Fabricacion" in Uruguayan Export Contract for Watches. A United States importer placed an order with a Uruguayan exporter for 1,000 watches. Upon arrival, the importer allegedly found the merchandise to be of a different brand than he had ordered and also claimed that the crystals in the watches were loose. The Inter-American Commercial Arbitration Commission was able to secure the consent of both parties to submit this matter to arbitration under the administration of its Uruguayan Committee in Montevideo. The three Uruguayan arbitrators found (1) that the order for the watches specified "Fabricacion Sultana" which meant "of Sultana manufacture" and, therefore, the Uruguayan exporter had kept to the specifications of the order by shipping a brand called "Brama" which also was manufactured by Sultana, and (2) that since an inspection of the merchandise arranged by agreement of both parties in Montevideo found the watches to be in good condition at the time of shipment and the shipment in question was FOB Montevideo, the exporter was not responsible for any damage that may have occurred in transit or at any time after the shipment was placed on board the ship. The arbitral award was thus rendered in favor of the Uruguayan exporter.

Release of Blocked Funds of Venezuelan Firm assisted by Commission. A New York exporter requested the assistance of the Commission in the adjustment of a matter pending with a Venezuelan firm which owed approximately $1,000 outstanding on several shipments of merchandise. Upon inquiry by the Commission it was found that the Venezuelan merchant had been on that country's black list for some time and that his assets were frozen. Through the assistance of the Commission's National

Committee in Venezuela a portion of the Venezuelan firm's assets were released and as a result payment was made to the New York company.

Re-export Permit in Chile as a condition for settlement Secured by Commission. A Chilean manufacturer purchased a drum of methyl melubrin from a New York exporter which, upon arrival in Chile, was found to be unacceptable to the customs authorities who confiscated the drum. The Chilean firm was referred to the Commission by the American Chamber of Commerce in Santiago, Chile and requested that the drum in question be re-exported to the United States and the purchase price of $2,000 refunded. The Commission was able to secure the consent of the New York Company to take back the drum in question but was confronted with the problem of securing from the Chilean customs authorities a re-export permit. Through the efforts of the Commission and the American Chamber of Commerce, this permit was finally obtained and the drum shipped back to the United States and the original purchase price was refunded to the importer.

Claim of Argentine Agent to Commissions Settled. A dispute arose between an Argentine firm and an export house in New York City over the payment of commissions in the amount of $6,000. Both parties admitted that the commissions were due but were unable to reach an agreement as to the amount that should be paid to the Argentine agent. Several conferences were held between a representative of the Commission and the New York firm and as a result an agreement was reached whereby the sum of $4,000 was to be paid by the New York company to the Argentine agent in settlement of its claim to commissions.

Amicable Settlement of Dispute with British West Indies Exporter. A New York importer placed an order with a shipper in Dominica, British West Indies, for the purchase of sheep skins. Upon arrival, the sheep skins were allegedly found to be of a quality inferior to the specifications of the contract and the New York merchant made a claim against the shipper for $5,525. The contract in question contained the Commission's arbitration clause and as a result a demand for arbitration was filed with the Commission against the party in Dominica and arbitration proceedings were initiated. Before the date set for the first hear-

ing, the parties reached an amicable settlement and as a result this case was withdrawn from arbitration.

Rise in Ceiling Price a Windfall to Cuban Sugar Exporter. A New York sugar broker and a Cuban sugar mill entered into a contract for the purchase of the annual output of sugar of the Cuban firm. On or about December 19th of last year when the OPA raised its ceiling on sugar, a shipment of sugar was on board a boat in the port of Baltimore which had not yet been taken off the boat and inventoried. The New York broker was able to sell the sugar at higher OPA price and as a result a windfall of $19,600 was secured by the New York broker. Both the Cuban sugar mill and the New York broker claimed this amount, the Cuban sugar mill claiming that the agreements between the two parties, both oral and written, required that any rise in price would return to the sugar mill, and the New York sugar broker claimed that this windfall was not covered by the agreement. The matter was submitted to three arbitrators in accordance with the rules of the Inter-American Commercial Arbitration Commission, and an award was rendered in the favor of the Cuban sugar mill in the amount of $19,600, the arbitrators finding that this particular windfall should be paid to the sugar mill.

VOLUNTARY ARBITRATION AND WILLINGNESS TO SUBMIT TO ARBITRATION

HENRI BINET *

The idea of submitting the adjustment of divergent views or opinions to the discretion of a disinterested agency dates back to time immemorial. It has been resorted to in all times and for all domains of human knowledge. On the whole, one may be safe in saying that it has met with very tangible success indeed, whether in the national or international sphere. Nowadays, it is heard of mostly in connection with industrial disputes where, however, it does not appear as effective as in commercial cases.

It is necessary to pause for a moment to consider what could be the main reason for the relative failure of arbitration in the adjustment of certain industrial conflicts and see what remedy may be in the offing.

If we examine the leading industrial cases where arbitration has failed and compare them with the average commercial arbitration cases, we discover that while certain groups are interested in the outcome of the issue in each case, the number of persons concerned in the latter cases is usually smaller than in industrial disputes. These larger industrial groups are sometimes more homogeneous and better organised to make their interest felt than is the case in commercial arbitration. In other words, the difficulties encountered in making arbitration a success are often the direct consequence of the numerical strength of the opposing parties or groups. Now why is that so? Merely because reason does not always prevail in such matters. The persistence of the litigants and the exaggeration of their claims grow with the expectation they entertain of pressing their case to a point where the opponent must surrender out of sheer economic necessity. The dispute becomes in reality a conflict of economic power quite independent of the sometimes lofty motives invoked by the promoters.

A conflict of power need not necessarily be a prolonged one. It is seldom so when the opposing forces are of unequal strength.

* Member of the Bar of the Province of New Brunswick and of the Bar of the Province of Quebec.

In fact, when there is too much discrepancy between their respective staying power, the conflict scarcely comes to the surface, it may simmer awaiting a breathing spell, but meanwhile causes no explosion. In the old days, the economic power was on the side of the employer who had it too much his own way, at any rate in the case of the so-called bad employer. As time slipped by, the workers became organised in self-defence and when they got to be strong enough, then they felt it their duty to stand up to industrial magnates. The net result is that the balance of economic power in industrial matters is just as much a source of labour conflict within national boundaries today as the old political balance of power between certain states was the cause of international ambitions—until quite recently!

It is hoped that the United Nations will develop all possible means to prevent international wars. Would it not be reasonable to expect that some procedure could also be devised to regulate national economic power clashes between capital and labour? The basic structure of the system would of course rest on the fundamentals of arbitration. But arbitration machinery like any other device cannot operate effectively unless it is given a fair chance to function. What is that chance to be? Merely a willingness on the part of the actual or potential disputants to submit their differences to the arbitrament of a neutral agency. A real willingness however there must be. A sham declaration in favour of voluntary arbitration will not suffice.

The expression "voluntary arbitration" is used in contradistinction to "compulsory arbitration," meaning a form of arbitration imposed by the State whereby the litigants must not only have recourse to arbitral proceedings, but also abide willy-nilly by the award of the arbiter. State compulsion in this sense must be differentiated from contractual compulsion which is essentially a self-imposed obligation to submit to arbitration proceedings and to accept the decision issuing therefrom. Compulsion which derives from a contractual obligation is to all intents and purposes the result of a voluntary act and therefore pertains to the realm of voluntary arbitration.

The briefs submitted to the Government authorities by the employers' and workers' organisations reveal that neither of them wishes to have any form of compulsory settlement of their differences foisted on them. They declare themselves unhesitatingly in favour of voluntary arbitration measures. But there is a danger in certain quarters this declaration in favour of

voluntary arbitration is inspired only by a negative intent: it aims mainly at escaping compulsory arbitration without really being inclined to accept the contractual obligation to have recourse to arbitration. And yet non-compulsory arbitration machinery holds very meager prospects of being successful if the potential or actual disputants retain complete freedom to decide when and under what circumstances they will accept the arbitrament of a third party, and whether or not they will abide by his decision. For instance, to consent only *ex post facto* to an arbitral award implies that the party concerned is just as prepared to reject the decision if found unfavourable. But to accept only what is favourable lacks that element of give-and-take which is essential to the fruitful development of the idea of arbitration.

Consequently, it should be borne in mind that if industrial peace within the national boundaries is to be maintained, and compulsory arbitration from higher authorities staved off, there must be present some contractual obligation to accept all phases of arbitration under certain conditions. That is what is meant by willingness to arbitrate disputes. It should be part and parcel of any system of voluntary arbitration, otherwise acceptance of voluntary arbitration may signify not only opposition to compulsory arbitration, but also the very negation of any real intent to seek a just and peaceful adjustment of differences.

Once the responsible government authorities have discovered that those who favoured voluntary arbitration in opposition to compulsory arbitration merely intended to nullify the best known means of avoiding national economic power conflicts, then it becomes necessary for these authorities to impose obligations where there has been shown an unwillingness to assume them under a system of voluntary arbitration.

The first form of compulsion to which in such cases the State might resort should be that of compulsory conciliation. Off-hand compulsory conciliation would strike one as being in a sense a misnomer. In reality it is not so. Here again, the notion of compulsion is that of State compulsion, and signifies that the responsible authorities insist on some attempts being made by the parties to the dispute to compose their differences by mutual understanding.

It goes without saying that voluntary conciliation, that is, a willingness of the parties to come to terms, is always encouraged and finds its rightful place in all procedures. Only when the parties refuse to see eye to eye on their own initiative or at the

instigation of the governing authorities, is it necessary to call on the arbitrator. And it is only when the disputants are unwilling to refer their case to the arbitrator that the State need interfere.

Politicians are naturally reluctant in democratic countries to suggest laws authorising such interference. That reluctance is most understandable. Nevertheless, if democracy is to survive, the government must govern for the majority by whom it is elected. The greatest menace to democracy is government by organised minority groups who have mainly, if not only, their own interests at heart.

Abuses must be done away with in all possible cases. If they are reprehensible when propagated by the legitimate democratic majority, they are no less to be condemned when engineered by organised minorities. This does not necessitate in any way the suppression of freedom. On the contrary, it implies the protection of freedom by the suppression of its abuses, no matter from where they proceed.

Another war has just been fought in the name of freedom, particularly freedom against government intervention as practised by the totalitarian States. In the process government controls were resorted to. These, of course, were only partial and temporary controls designed to help in the suppression of totalitarian controls exercised in the non-democratic countries. Nevertheless, in democratic countries there is great aversion to government intervention, not only because lives have not been sacrificed for its suppression in totalitarian States, but also because of the unpopularity of the official controls which trammelled certain forms of freedom during the war and for a certain period of time thereafter.

The general public will submit to considerable abuse of pressure on the part of organised groups in order to safeguard the principle of freedom from government intervention where this is not indispensable to the good government of a country. But there is a point at which the line must be drawn. If industry is to be paralysed by lockouts or strikes arising out of the unwillingness of certain interested parties to negotiate a settlement, it is not at all impossible that the democratic majority will wish to impose restrictions on the freedom of negotiation of certain minority groups for the benefit of the general population. This is what must be borne in mind by the well-organised groups who are more inclined to trust their economic power than common sense.

BRITISH INDUSTRIAL ARBITRATION

V. R. ARONSON *

Arbitration as a method of settling disputes between employers and workmen has now become a permanent feature of British industrial life. Starting from small beginnings it has developed rapidly in the last thirty years, and the parties to industrial disputes are now expected to, and usually do, submit their differences to one or another of the methods of arbitration before any such drastic action as a strike or lock-out is taken. During the war, and the two years since, there have been a certain number of strikes, but they have all been what are called "unofficial," i.e. led by irresponsible minorities against the advice of the trade union. There has not been a single strike resulting from any dispute backed by a trade union. In every case the matter has been submitted to arbitration in one form or another, and the parties have loyally abided by the arbitration tribunal's decision. This surely is proof that a properly conducted arbitration is as useful in industrial as in commercial disputes, as a method of settling differences with a minimum of bitterness, delay and expense.

In order to procure that result two things are essential; first, that the parties should have confidence in the ability and impartiality of the tribunal, and, secondly, that there should be no avoidable delay in the conduct of the proceedings. As to the former requisite, the system in this country as detailed below is satisfactory. After a dispute has been discussed before the Industrial Court, or a Wages Council, and an award made, it is the invariable experience that the parties accept the award and act on it. With regard to the latter, the position is not so satisfactory, especially in the case of Wages Councils, whose proceedings are, perhaps necessarily, rather slow and cumbrous. In disputes between employers and workmen a rapid decision is even more important than in commercial disputes and an acute situation rapidly deteriorates with each day of delay. Various suggestions for expediting the procedure of Wages Councils are now being discussed and it is hoped that a reformed procedure will shortly be introduced.

* One of the two Chairmen of the Industrial Court and Member of three Wages Councils.

The modern history of industrial arbitration begins with the Conciliation Act, 1896 (59 & 60 Vict. cp. 30). That Act provided for the setting up of conciliation boards for the settlement of disputes in any industry where a substantial number of persons concerned desired it. The main provision was never very much used, but a section of the Act empowered the Minister of Labour to appoint an arbitrator on an application by both parties, and such arbitrators were frequently appointed. The next step was the foundation of the Industrial Court by the Industrial Courts Act, 1919 (9 & 10 Geo. 5 cp. 69). This is a permanent body, with a secretariat and a court house in London. It grew out of the so-called Committee on Production, a war time expedient in the 1914/19 war, which was set up to deal with industrial disputes and to prevent stoppage of work in a time of crisis. The committee was so successful under its first president, the late Sir William Mackenzie (afterwards Lord Amulree), that it was formed into a permanent court by Act of Parliament. It consists of a full time president, and two chairmen who give part time services as required. These three are always lawyers. There are also one full time and two part time representatives of employers and workmen respectively, and two women members who only sit when questions mainly affecting women workers are before the court. The court usually sits in a division of three members, the president or one of the chairmen presiding and one employer member and one workman member sitting with them. Occasionally, for cases of unusual importance, a court of five is constituted. This court is in almost continual session. It travels to any part of the country where its services are required, and has proved an efficient instrument in settling disputes without stoppage of work or loss of temper. The procedure before the court is very informal and elastic, and the provisions of the Arbitration Acts do not apply to it. Although the parties have the right to be represented by counsel, this right is seldom exercised and the cases are usually conducted by trade union officials and secretaries of employers' associations. The Act of 1919 also authorises the Minister of Labour to appoint a single arbitrator if so requested by the parties.

References to the Industrial Court are, of course, by consent of the parties and the idea of compulsory arbitration was unknown in England until the commencement of the recent war. It was then felt necessary to have a body with power to settle

trade disputes compulsorily. Various statutory orders have been made under the Defence Regulations by which employers in essential industries were forbiden to dismiss workmen and workmen were forbidden to leave their employment (subject of course to certain safeguards) and strikes were absolutely prohibited. In those circumstances a new body, the National Arbitration Tribunal, was set up, to which trade disputes could be referred without the consent of the parties and with whose decisions the parties were obliged to comply. This was an entirely new departure in industrial arbitration, meant to meet a temporary emergency, and the intention was, and still is, that it should cease when normal conditions return.

When a dispute is reported to the Ministry, the officials there always attempt to get the parties to consent to a reference to a single arbitrator or to the Industrial Court and only in the last resort is it referred to the National Arbitration Tribunal. The Tribunal is one of great authority, the first president being a High Court Judge and the members including the Vice Chancellor of Oxford University and other distinguished persons. Its decisions have always been complied with, but it is not the class of tribunal which would find favour in normal times, and if one of its decisions were defied the consequences might be serious.

Side by side with the tribunals already mentioned, which conduct arbitrations properly so called, another method of maintaining industrial peace has existed, namely, the Wages Councils (until recently called Trade Boards) set up under the Trade Boards Act 1909 (9 Edw. 7 cp. 22) and the Trade Boards Act 1918 (8 & 9 Geo. 5 cp. 32), as recently amended by the Wages Council Act 1945 (8 & 9 Geo. 6 cp. 17). Trade Boards were originally instituted for trades in which sweated conditions existed, and in which the workers were not sufficiently well organized to obtain proper conditions for themselves. Starting in four trades only, the provisions of these Acts have gradually been extended to over fifty industries. A Wages Council consists of a number (usually about twenty) of employers' representatives, a similar number of workmen's representatives, and three independent members, of whom one is chairman, appointed by the Minister, who are usually barristers, university professors, or retired civil servants. The duty of each council is to regulate wages and conditions of employment in its industry. It differs therefore from an arbi-

tration tribunal in that it deals with these matters before, and not as a rule after, disputes have arisen. When the workers' side desires an increase in wages, a shortening of hours, or an increase of holidays, or whatever it may be, their leader introduces a resolution which is discussed at the meeting of the Council. Usually some counter offer is made by the employers, and discussions ensue in which the independent members try to secure agreement between the two sides. This frequently occurs and a motion embodying the compromise is carried without opposition. When agreement cannot be reached the independent members have a casting vote, but they are reluctant to use it if it is possible to avoid doing so, since an alteration of conditions forced on an industry by a vote of outsiders is not likely to be accepted without difficulties. But it is surprising how often an agreed solution can be reached, under a tactful chairman, although at the outset of the discussion the two sides appear to be miles apart.

When a Wages Council agrees to recommend an alteration in wages or conditions, the Minister of Labour is empowered to (and practically always does) make a statutory order bringing the new conditions into operation. The order has the force of law and employers who do not observe its terms are guilty of a criminal offence and can be prosecuted and fined. The Ministry maintains a staff of inspectors who visit factories and workshops and whose duty it is to see that the orders are complied with. The minimum standards thus enforced are not, as a rule, the only ones prevailing in any given industry. The larger employers frequently enter into agreements with the trade unions to pay higher rates than the Wages Council rates. Failure to do so is, however, merely a breach of contract and not a punishable offence.

The weak point of the Wages Council system is that it unfortunately, works very slowly. As its decisions have the force of law it was felt that they ought not to be arrived at without all interested parties having an opportunity of expressing their opinions and a very cumbrous procedure for enabling this to be done was devised. Without going into too much detail, the procedure provides that, on a proposal being approved by the council, copies of it have to be displayed in all factories and workshops in the trade concerned and any employer or workman can put forward written objections, which have to be considered by the Council before the proposal goes to the Minis-

ter for his approval. All this takes time, usually several weeks, and where relations between the sides are strained so long a delay may be fatal. In a recent case the delay enforced by the statutory regulations was so great that the men, who were asking for a reduction in their hours of work, took the matter into their own hands and started an "unofficial" strike, which was only ended when the Minister appointed an *ad hoc* tribunal to deal with the dispute.

These two systems, industrial arbitrations and the Wages Councils, play a very important, increasing and useful part in English commercial life. Although capable of improvement, the systems have tended to produce peace in industry and have certainly made for better understanding and better relations between employer and employed. Every industrial dispute that gets beyond the stage of internal settlement is referred to one or other of the bodies above mentioned. Sometimes they fail, but in the great majority of cases they succeed in finding a solution acceptable to the parties. In particular it is their function to prevent disputes reaching the stage of strikes and lockouts and in this they are nearly always successful.

NEWS AND NOTES

Grievance Machinery for United Nations Staff Members. An Appeal Board was recently set up to hear grievances of staff members against personnel decisions by the U. N. administration, especially with respect to termination of employment or alleged non-observance of agreed terms of appointment. Membership of the board whose secretary is Paul de Rodzianko of Great Britain, consists of five members, two named by the Secretary General and two from the staff, to be elected annually by staff ballot, and a chairman named by the Secretary General in agreement with the Permanent Staff Committee. Decisions of the board who awaits twenty to thirty appeals will be in the nature of advice to the Secretary General, with whom the final decision on appeals will rest.

Training of Arbitrators. Said Walter L. Daykin, Professor of Labor Economics, State University of Iowa, recently in Iowa Law Review, Vol. 32, p. 184: "While arbitration is a fertile field for lawyers, a knowledge of law alone is not adequate.

The work necessitates training in industrial engineering, economics, personnel relations, psychology, and other related fields. A study of the decisions of the arbitrators shows clearly that persons in this important activity must be thoroughly acquainted with the problems of management and labor, collective bargaining agreements, job analysis, factors that determine wages, seniority, vacations, and many others. The need for trained persons for this work is increasing daily and very few institutions are prepared to supply qualified persons to meet the demand. This suggests that universities need either to change some courses offered or to arrange to have the various departments coordinate their efforts so that qualified arbitrators can be trained."

Master Agreement in Building Industry. A plan of construction contractors and the AFL to arbitrate any dispute between their respective members recently set up a National Joint Conference Committee to provide machinery for voluntary arbitration. The agreement between the Associated General Contractors of America, Inc. and the Building and Construction Trades Department, AFL provides as its purpose "to get up machinery for the settlement of any dispute or disagreement which may arise and which is voluntarily submitted to the committee by mutual agreement of the parties involved in the dispute, thereby furnishing adequate machinery for the settlement of such disputes or disagreements in an orderly manner without any stoppage of work by lockout or strike."

Public Recognition. Two striking events in recognizing men who have brought about better relations in their fields, recently came to the attention of the American Arbitration Association. At the Nunn-Bush Shoe Company, Milwaukee (AAA members) three retired top officers, Henry L. Nunn, A. W. Bush and J. C. Johnson were honored by the Union groups for the remarkable achievement in labor-management cooperation at Nunn-Bush. The arbitration provision which the Company has carried in its contracts with the workers has been there for 30 years (that is to say, nine years before the AAA was founded).

The Associated Men's Wear Retailers of New York, Inc. and the Hat & Furnishings Salesmen's Union, Local 721, celebrated their tenth anniversary of collective bargaining. Mr. Samuel Wolchok, President of the Retail, Wholesale & Department

Store Union, CIO, Mr. Martin Koppel, President of Local 721, as well as Mr. Isidore S. Immerman, Executive Director of the Associated Men's Wear Association, commented on the AAA clause which has been a part of the collective bargaining agreement since its earliest date. Disputes have decreased, but the clause continues in use.

Voluntary Labor Arbitration favored by International Labor Organization. The Third Conference of the American States Members of the ILO adopted a Resolution (No. 8) concerning voluntary conciliation and arbitration and the principles considered to be the basis of any system for the voluntary adjustment of labor disputes. The resolution reads with regard to voluntary arbitration as follows:

> "(1) There should be instituted voluntary arbitration machinery which may be resorted to either before or after conciliation procedures. (2) Recourse to arbitration should be voluntary; but once a dispute has been submitted to arbitration by consent of all the parties concerned the parties should agree to accept the award."

In a further ILO report on Non-Self-Governing Territories, the following provisions suitable for a convention are recommended under the heading "The Settlement of Collective Disputes": "1. As rapidly as possible, machinery shall be created for the settlement of collective disputes between employers and workers. 2. Representatives of the employers and workers concerned, including representatives of their respective organisations, where such exist, shall where practicable, be associated in the operation of the machinery, in such manner and to such extent, but in any case in equal numbers and on equal terms, as may be determined by the competent authority."

Impartial Chairman, Coat and Suit Industry. A recent publication contains the awards which were rendered by the late James J. Walker as Impartial Chairman from January 1, 1942 to September 5, 1945. They deal with disputes on non-union and non-designated sources (contractor shops); the concealing of records of transactions with non-union firms; the employment of non-union workers; the withholding of payment from regularly designated contractors; and especially with the failure to attach Consumer's Protection Labels to all garments manufactured by the firm and for its account.

The Committee on Labor and Industry of the Pennsylvania Bar Association, of which William S. Culbertson is Chairman, submitted a report making a recommendation for the establishment of a section on Labor Law appropriate to the development of labor arbitration in Pennsylvania. The report reviewing pertinent court decisions is reprinted in Pennsylvania Bar Association Quarterly, Vol. XVII p. 396-411.

Voluntary Industrial Arbitration in Military Occupied Countries. The Control Council for Germany issued Law No. 35 regarding Conciliation and Arbitration Machinery in Labor Conflicts. It provides for the submission of certain industrial disputes to Arbitration Commissions to be established by the German Labor Authorities of each Province or Land. In Japan, the Labor Relations Adjustment Law, passed by the Japanese Diet, provides for different means of settlement of disputes by Labor Relations Committees, Chapter IV, Articles 29-35, dealing specifically with arbitration. The full texts of both aforementioned Laws are available on request at the American Arbitration Association.

EDUCATION

CATHOLIC LABOR SCHOOLS

REV. PHILIP A. CAREY, S.J.*

They were sitting across the conference table, hammering out next year's agreement. Hard thinking and straight talk, but underneath it all a basic mutual understanding. It hadn't been this way last year under the old administration. Bitter sessions of wrangling, distrust and name calling led up to a nine week strike. This year it was different. "Dillon," said Mr. Dixon, "your demands are tough, but they're not unfair. The record of the year just passed has given us of management, confidence in you fellows. The grievance procedure works. Two cases went to arbitration, and while we lost in both of them, all around, our relations are better. Though the experience of other plants in the City shows a marked decline in productivity, here, it has gone up. You, people are responsible."

This really happened. Now, the whole factory didn't reform all by itself. True, a change in management attitude did wonders, but it was the men themselves and their union leaders who were in the main responsible for the difference. "You can't legislate maturity," said Mr. Dave Dubinski. Responsibility comes from understanding and from training in unselfishness. Education can help.

Across the country from Rhode Island to Seattle in small towns and metropolitan areas, in Shenandoah and Detroit, several hundred labor schools are functioning under Catholic sponsorship. Most of them started between the years 1936 to 1944, though several are much older. Some are small; others with a very wide program. These evening, free schools are staffed by volunteer instructors from unions, professions and clergy. They welcome all men of good will, whether Catholic or not. Most of the students are workingmen. The schools do not attempt to dictate policies. They hold honest, constructive discussions on the day to day issues that face workingmen. They aim, merely "to help men help themselves."

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They believe that leadership of labor must come from workingmen themselves. Priests are not and cannot be leaders of workers, nor politicians nor employers. The only real leaders of workers must themselves be workers. Leaders are not born; they are educated, trained. They must be men of solid principles, men who know labor organization, men with breadth enough to see the relationships between capital and labor, farmers and labor, consumers and labor, the common good and labor, men with vision enough to see the still bigger (and more unselfish) part that labor is yet to play in the life of our country. They must have principles, courage, honesty and ability. Such leaders must be trained.

But leaders are not enough. Any democracy gets only the leaders it deserves. Leaders no matter how intelligent or how noble, will not long remain good leaders unless the rank and file insist on keeping them good leaders. That means that all members of unions must fulfill their democratic duty of taking a very live, active and intelligent interest in all union activities. They must be educated to play this very important role. Further, the problem of labor and industrial relations is the problem of the country at large. All Americans, employers, business men, politicians must come to have a sympathetic understanding of the rights of workers. The independence, the security and the self-respect of the majority of the American people is the direct concern of all the people.

To this end are these courses given. The approach is not a negative one, merely decrying abuses. The schools try to develop a positive, constructive attitude. "What can we do to promote social and industrial justice and peace in our shops?" Experience has taught us that we simply cannot live decently if every one lives selfishly just for himself. We are social beings. Man is the essential element in production, at the same time its cause and end. We must live with others: work with others.

Spread over so great an expanse, and dealing with divers local conditions, one might expect differences in approach and methods. By and large, all the schools follow the same broad lines. They stress the rights and duties of labor, labor ethics, labor history, economic problems, laws, labor management relations. Some schools give courses in union methods, contract negotiations, job analysis and the preparation and conduct of an arbitration case. All schools thoroughly support voluntary arbitration for the final solution of disputes. Parliamentary procedure and

public speaking are universal courses. Attractive features of the schools are the forums, panel discussions and the lectures at which outstanding experts in various fields are invited to participate. These include union and management officials, men from governmental agencies, staff members of the American Arbitration Association, columnists, public figures, etc.

In every school, the religious approach is taken for we are convinced that the industrial problem is ultimately a human problem, a religious problem. Suffering, unemployment and insecurity can be traced back to a very human source, greed and selfishness in the human heart and ignorance in the human mind. No matter how perfect your union technique, or your industrial technique or your political technique, if they are based on greed, on selfishness, on me-first-last-and-always-all-the-time, they cannot cure our problems. Only religion deeply understood and sincerely lived can take greed and selfishness from us. The general sketch of basic principles are outlined in the papal and episcopal letters on these topics.

Management men have their part in these schools.

Sometimes, as at the Rockhurst College Institute of Industrial Relations of Kansas City, men from both management and labor gather together. At Rockhurst, the parties discovered that much of their dissention arose out of the fact that unconsciously, they had been using the same word but with equivocal meaning. They set about a joint venture and composed a large dictionary of terms used in collective bargaining with accurate definitions. In other places, the groups meet separately in their own discussions. The Industrial Conferences of the National Catholic Welfare Council have done excellent work in many cities. Here at the Xavier Institute of Industrial Relations, seventy-eight men were enrolled in the Leaders Classes, 417 in the Labor School proper, and fifty-eight took part in the Grievance Clinic, developed by Comm. Walter A. Maggiolo of the U. S. Conciliation Service. For sixteen weeks, these men worked out the solutions of "live" cases under the coaching of experienced personnel and labor representatives.

It is too early to tell what these schools have accomplished. They do represent a sincere effort in the cause for social peace and industrial justice and harmony.

ARBITRATION IN LEBANON

DR. ALFRED TABET *

In our present time, where oceans and continents may be spanned in a single day, no one nation can say that what it does concerns only itself and does not affect the interests of others. Developing that main principle Dr. Ivan Kerno, the Assistant Secretary-General of the United Nations (American Bar Association Journal, Dec. 1946 p. 840) inspiriting a plea for international law, asked for help and general cooperation in order to promote the progressive development and codification of the International Law. In the absence of world legislature and according to the United Nations Resolution at the Session of the General Assembly meeting at Flushing Meadows on the 10th of December 1946, every state has to provide its assistance.

A report on the Arbitration system in Lebanon may be of some modest use in the attainment of a part of this objective, and contribute to unify "arbitration." Hearing the call of the hour for Arbitration, the New Lebanese Code of Civil Procedure recognises as valid, agreements to arbitrate civil and commercial disputes and gives special security to foreign traders.

The main principles governing arbitration in Lebanon may be resumed as follows:

1. In order to constitute a submission to an arbitrator, there must be some difference or dispute, either existing or prospectus, present or future.

2. All civil and commercial matters may be referred to arbitration, provided they do not concern matters that cannot be settled between the parties by transaction or agreement or of which they may not dispose. A dispute concerning public policy or arising from or founded on some illegal or "ultra vires" transaction, cannot be referred to arbitration (Art. 828).

3. Capacity to make a submission is co-extensive with capacity to contract. Conversely, in the case of persons whose capacity

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to contract is restricted, the power of making a submission is in the same manner and to the same extent limited.

4. Agreement for submission must be in writing. It may be complete in itself or only a clause or clauses in another agreement or contract. It cannot be proved by "witness" or "presumptions."

5. The parties may appoint whomsoever they please to arbitrate on their dispute. They may both appoint a single arbitrator. If each one of them appoints a different arbitrator, the two arbitrators appoint an umpire. If they do not agree about him he is appointed by the President of the Court of First Instance, who would be comptetent to judge the case himself or the Judge of the Peace if there were no arbitration (Art. 830).

6. The arbitration clause itself may name the arbitrator or the arbitrators, or direct how they are to be selected in pointing to their situation or quality (Art. 832).

7. If a single arbitrator appointed by the parties refuses to act, each party may renounce the arbitration (Art. 847).

8. The two parties may agree to revoke an arbitrator.

9. If one of the arbitrators refuses to act, for any reason, a new arbitrator is appointed by the party who selected him.

10. If an umpire refuses to act, a new one is nominated by the agreement of both arbitrators and if they fail by the President of the Court of First Instance (Art. 846).

11. The arbitrator who accepts his appointment is liable for damages if he withdraws or does not give his award within the prescribed time (Art. 843).

12. As a contract, the submission must clearly indicate the intentions and agreement of the parties as to what matters shall be submitted to arbitration and contain the appointment of the arbitrator or arbitrators and their fee.

13. In the arbitration clause as well as in the submission, parties may agree for the application of a foreign law or habit or custom (Art. 822 and 829).

14. Unless they are appointed by the parties as "amiable compositeurs," the arbitrators must decide according to the law, and the usual rules of procedure.

15. The award must be made within a month after the arbitrators accepted the appointment unless the parties prescribed in the submission itself the time within which the award is to be made. If an inquiry is decided, the final award has to be

made within the fortnight that follows the results of the inquiry (Art. 842).

16. An award cannot be enforced without a writ of execution delivered by the President of the Court of First Instance when the arbitration has been made in Lebanon. The writ of execution is subject to appeal and the appeal's decision is subject to retraction by "requête civile," mainly in case of fraud (Art. 837 and 838).

17. Difficulties concerning the enforcement of the award are within the competence of the Court whose President delivered the writ of execution.

18. A submission may be made while a case is pending before the Court of Appeals. In that case, the award is subject to no recourse or appeal and is enforced by a writ delivered by the First President of the Court of Appeals.

19. An action for annulment of the award may be brought within fifteen days from the President's writ. The main grounds for annulment are:

a) The decision without a submission or the decision of matters which are not within the scope of the submission or which have not been requested by the parties.

b) The nullity of the submission and the expiration of the time prescribed in it.

c) The decision of an umpire without conferring with the arbitrators.

20. When the submission entrusts the arbitrator or arbitrators with a friendly composition "amiables compositeurs" their award has to be based only upon good conscience and is not subject to appeal. Only an action for annulment of the award and a retractive "requête civile" may be brought against their award (Art. 848).

There are special provisions in the Lebanese Court as to the action against a party who refuses to execute an arbitration clause and the damages to be paid (Art. 825 and 826).

Foreign awards are assimilated to foreign judgments and their enforcement is governed by the same legal dispositions (Art. 849). Therefore foreign arbitral awards rendered in civil and commercial matters shall have in Lebanon the same force as in the country where they were pronounced, provided they comply with the following requirements fixed up for the enforcement of foreign judgments by the Decrees N° 1113 of the 19th. November 1921, N° 2225 of the 25th. April 1929 and

N° 43/L.R. of the 20th. May 1931, according to the Art. 451 of the Lebanese Code of Civil Procedure:

a) They must have been rendered by a tribunal competent according to the *lex fori.*

b) They must have a final character or the authority of *res judicata* in the state where they were rendered.

c) The party against whom they were pronounced must have been legally summoned, or represented in conformity with the law of the country in which the trial was held.

d) They must not conflict with public order in the country of their enforcement.

A complete and authentical copy of the final award must also be produced when its enforcement is requested.

The rules governing the procedure in arbitration enacted by the Lebanese Code are very liberal. They offer security and are well adapted for international codification. In allowing agreements for the application by arbitrators in Lebanon of foreign laws or habits and customs, the Lebanese Code will contribute towards better understanding and cooperation between foreign traders, specially if they incorporate in their contracts a standard arbitration clause.

REVIEW OF COURT DECISIONS

CIVIL

Fair Rental Arbitration Must Comply with Statutory Requirements. The Emergency Rent Laws provide that notice of the hearing before an arbitrator and a copy of the award has to be served upon the other party (for text see *supra*, p. 145). Such steps required by the statute cannot be waived, and failure to comply makes the arbitration proceeding defective, and if the party desires to have the rent fixed pursuant to the Rent Law, proceedings should be *de novo* before another arbitrator. *Loralie Realty Corp. v. Kings Lumber Corp.*, 69 N.Y.S. 2d 374.

Confirmation of Award Conclusive although Judgment was not Entered Upon Award. In an arbitration to fix a reasonable value of a loft, the tenant consented to the entry of the court order to confirm an award. Although no judgment has been entered on the award, the order "finally determined the controversy between the parties. In all respects it has the same effect as a judgment (cf. *Jacobowitz v. Herson*, 268 N.Y. 130, 136)." Thus, a motion to vacate the award on alleged fraud and corruption of the arbitrator was denied. *Fabriton Co. v. William J. Morris Co., Inc.*, N.Y.L.J., March 7, 1947, p. 908, Hecht, J.

Vacating of Award only within Statutory Time Limit. In an arbitration to determine fair rental value, the tenant and his attorney were present in court when they consented to the confirmation of the award. Nine months after confirmation, the tenant moved to vacate the award. Such motion was denied in view of the fact that pursuant to sec. 1463 Civ. Prac. Act a motion to vacate an award must be served upon the adverse party "within three months after the award is filed or delivered." *Herbert v. Charles Miller Coat Co., Inc.*, N.Y.L.J., May 16, 1947, p. 1932, Miller, J.

Refusal to Arbitrate does not Release other Party from Arbitration Agreement. A dispute under a construction contract was submitted to arbitration under the provisions of Chapter 257 of the Code of Virginia, Section 6159; an award in favor of the contractors was affirmed by the courts, *Martin v. Winston*, 181 Va. 94, 23 S.E. 2d 873, cert. den. 319 U.S. 766, 63 S.Ct. 1330. The award contained provisions which required further performance by the contractors, namely, the giving of a guarantee for concrete floor, and to do further heating work at no additional cost to the owner. The original arbitration agreement provided for the settlement of future disputes as follows: "If a controversy shall arise after the award as to whether the award or any part thereof has been complied with, such controversy shall be determined by the same arbitrators or a majority of them." A controversy arose and the contractors refused in a letter to arbitrate, since they did not agree that an actual controversy had arisen since the first award. The owner thereupon requested the court to revoke a previous order requiring the parties to submit to arbitration and thus release it from the obligation of the arbitration

agreement, this in view of the contractors' refusal to arbitrate. In reversing the judgment which revoked the order, the Supreme Court of Appeals of Virginia said: "Even if the contractors' letter complained of a refusal on their part to arbitrate, this did not *ipso facto* release the parties from their agreement. Code, Sec. 6160, provides: 'No such submission, entered or agreed to be entered of record in any court, shall be revocable by any party to such submission, without the leave of such court; . . .' Nor do we think that such refusal, under the circumstances stated, warranted the trial court in revoking the agreement. The attitude of the contractors deprived Miss Winston of no right or remedy to which she was entitled. Notwithstanding such letter, she was and still is free to pursue her remedies under the arbitration agreement, and this, we think, she must do." *Martin v. Winston*, 40 S.E. 2d 247.

COMMERCIAL

Validity of Contract with "Ceiling" Price is a Triable Issue. When a contract containing an arbitration clause is invalid because it failed to fix a price for the merchandise, the arbitration clause must fall with the contract (*Kramer v. Uchitelle, Inc.*, 288 N.Y. 467, 477). A contract fixed the price of the merchandise to be delivered at "ceiling," without indicating whether the parties referred to the ceiling price in force at the time of the contract, or at the time specified for delivery, or (as the respondent contends) "the last OPA ceiling price in effect before price controls were removed." In such case, a trial was directed to determine as to whether a valid and enforceable contract was entered into between the parties. *Carole Wren, Inc. v. Knickerbocker Textile Corp.*, N.Y.L.J., March 22, 1947, p. 1126, Miller, J.

"Discussion of any claim whatever" Constitutes Agreement to Arbitrate. An offer of a seller of merchandise to arbitrate contained in a letter to the buyer was conditioned upon the latter's prior payment of all sums due. In view of the sentence that "In any event full compliance by your clients of their contractual and financial obligations, which is a '*sine qua non*' of discussion of any claim whatever, will in no way jeopardize any of their rights, if justified," it was held that the words "discussion of any claim whatever" are broad enough to include the arbitration referred to in a succeeding sentence of the same paragraph. The buyer, however, never complied with the condition which qualified the seller's offer to arbitrate, for it withheld payment of the claim against it. A motion to direct arbitration was therefore denied. *Stern, Morgenthau & Co., Inc. v. Picker*, N.Y.L.J., February 19, 1947, p. 677, Valente, J.

Question of Modification of Contract by Subsequent Agreement is for the Arbitrators to Decide. A written agreement to manufacture and sell certain airplanes and equipment for a stated sum contained the standard arbitration clause of the American Arbitration Association. After delivery and payment, a refund was claimed, based upon an alleged oral agreement subsequently made not containing an arbitration clause. Upon denial by the manufacturing corporation of the existence of such an oral agreement, the buyer initiated arbitration. A motion to stay an arbitration proceeding was denied, and this decision was affirmed, 269 App. Div. 1023. In the Court of

Appeals, the manufacturing corporation contended that the alleged oral agreement was separate and distinct from the written contract and was not a controversy arising thereunder and thus does not come within the scope of the standard arbitration clause of the American Arbitration Association. Thereupon the buyer asserted that the dispute as to the ultimate price of the equipment furnished under the written contract was one "which arose out of or related to that contract" only and that the question of its modification by oral agreement was for the arbitrators. In following that argumentation, the Court of Appeals affirmed the order which denied the stay of arbitration. *Intercontinent Corp. v. Curtiss-Wright Corp.*, 296 N.Y. 916.

Limited Arbitrability of Disputes on Dissolution of Partnership. A partnership agreement of an accounting firm provided for arbitration of any disputes which might arise between them "in respect to the conduct of the partnership or of its dissolution, or with respect to any other matter, cause or thing whatsoever arising out of or relating to this partnership." A controversy as to whether the present partnership should be dissolved and a new firm formed with an additional partner was not considered an arbitrable issue under the aforementioned agreement. Thus partners could not compel their co-partner to arbitrate on their disputed proposal for a new partnership with an additional partner or the dissolution of the present partnership. *Bercu v. Levinson*, 296 N.Y. 866, 72 N.E. 2d 607, affirming 270 App. Div. 537, 61 N.Y.S. 2d 116.

Arbitrable Character of Controversy Depends upon whichever Matter is "Subject of an Action." The president of a corporation had paid out of funds of the corporation fees of accountants for services to the corporation. The controversy as to whether this payment was unauthorized did not constitute a cause of action to the respondent inasmuch as such cause of action would accrue to the corporation only (*Weinstein v. Behn*, 65 N.Y.S. 2d 536). Thus respondent had no cause of action against the petitioner (the president of the corporation) for the alleged diversion of corporate funds. As sec. 1448 C.P.A. requires for submission to arbitration of existing controversies that they "may be the subject of an action" and as respondent had no right individually to sue petitioner, no arbitrable controversy existed. Said the court in granting a stay of arbitration: "There can be no judicial enforcement of any agreement to submit to arbitration under such circumstances (*Matter of Stern*, 285 N.Y., 239; *Matter of Select Operating Corp'n* (*Rogers*), 183 Misc., 666; *Matter of Swislocki* (*Spiewak*), N.Y.L.J., February 8, 1947, p. 542, col. 5)." *Matter of Berk*, N.Y.L.J., May 7, 1947, p. 1790, Hofstadter, J.

Return of Signed Copies of Sales Notes not Part of Contract but only Confirmatory Evidence. Sales notes of a Tennessee seller contained the words "This order accepted June....1946" and called for the return of signed copies thereof. A motion for a stay of arbitration was denied, the court stating: "The contracts came into being when the petitioner's orders were definitely accepted by respondent, as evidenced by the latter's sales notes so stating. The purpose of the request for the return of a copy signed by the petitioner was merely to obtain confirmatory evidence for respondent's records." *Arkay*

Junior Frocks, Inc. v. Brookside Mills, Inc., N.Y.L.J., May 2, 1947, p. 1718, Schreiber, J.

Controversy as to Cancellation of Contract is Subject for Arbitrator to Decide. A contract providing for arbitration under the Rules of the American Arbitration Association was challenged as having been rescinded. In an order directing arbitration the court said: "The contention that the claimed rescission must be determined before arbitration may proceed is not tenable. The issue of an alleged cancellation of the agreement is one which must be decided upon the arbitration (*Matter of Lipman (Haeuser Shellac Co.)*, 289 N.Y. 76; *Matter of Kahn*, 284 N.Y. 515)." *Samuel Kaplan & Sons, Inc. v. Fascinator Blouse Co., Inc.*, N.Y.L.J., May 7, 1947, p 1790, Hofstadter, J

Undisputed Conclusion of Contract Prevents Issue of Making of Contract from being Tried Before Arbitration. A motion to stay arbitration was denied with the following holding of the court: "There is a dispute and there is an agreement to arbitrate it. The validity and legality of the respective contentions making up the dispute are not the court's concern. They are for the arbitrator." *In re Kaplan*, N.Y.L.J., February 18, 1947, p. 658, Walter, J. A stay of arbitration was also denied when a written agreement for arbitration was concededly made and the petitioner claimed that he was fraudulently induced to sign the contract (see *In re Kahn's Application*, 284 N.Y. 515, 524). *Swerdlick v. La Femme Undergarments, Inc.*, N.Y.L.J., April 10, 1947, p. 1395, Valente, J.

Arbitration Agreement by New York Residents under South Carolina Contract Held Enforceable. A contract containing an arbitration clause provided that all terms and provisions thereof are to be subject to the laws of South Carolina. An arbitration to be held in New York was contested; the court however said: "It is undisputed that the parties are all residents of New York; the agreement of the parties is to arbitrate their differences in accordance with the rules of the American Arbitration Society, which is located in this city, and construing this provision in the light of the realities of the situation, it seems to me that it would mean to disregard realities to hold that it was the intention of the parties, all residents of New York, to arbitrate in South Carolina or any other place than here." (After parties were thus directed to proceed with arbitration, the controversy was settled in an amicable manner). *Brown v. Senor*, N.Y.L.J., March 25, 1947, p. 1157, Eder, J.

Agreement to Arbitrate Future Disputes need not be Subscribed. Sec. 1449, N. Y. Civil Practice Act provides that "a contract to arbitrate a controversy thereafter arising between the parties must be in writing." It is however unnecessary that such contract be subscribed by the party against whom the arbitration was sought. This was the holding with reference to *Matter of Exeter Mfg. Co.*, 254 App. Div. 496, 5 N.Y.S. 2d 438, and *Matter of Huxley*, 294 N.Y. 146, in *Samuel Kaplan & Sons, Inc. v. Fascinator Blouse Co., Inc.*, N.Y.L.J., May 7, 1947, p. 1790, Hofstadter, J., and in *Piedmont Shirt Corp. v. Golden*, N.Y.L.J., May 8, 1947, p. 1807, Schreiber, J.

Agreement to Arbitrate in New York Constitutes Submission to Jurisdiction of New York Courts. Under the 1944 amendment of Sec. 1450 Civ. Prac. Act

which must be considered to have changed the prior contrary rule (see *Sargant v. Monroe*, 268 App. Div. 123; *Red Line Commercial Co. v. Pastene Co.*, 269 App. Div. 632), an agreement to arbitrate in New York confers upon the Supreme Court jurisdiction to enter judgment upon the award. This was recently maintained in a case under the Rules of the AAA, where the defendant is a non-resident and was not served personally in New York. (Rule 39 of the American Arbitration Association Rules to which the contract referred, provides for service by mail, a procedure considered as valid submission to New York courts in *Mulcahy v. Whitehill*, 48 F. Supp. 917; see also *Prosperity Company v. American Laundry Machinery Co.*, 271 App. Div. 917, 67 N.Y.S. 2d 669, and this Journal, p. 91.) *Bradford Woolen Corp. v. Freedman*, N.Y.L.J., April 11, 1947, p. 1414, Cohalan, J.

Consideration of Claim within Stipulated Time Limit may be Disregarded. A contract referring to arbitration under the Rules of the American Arbitration Association provided that "no claims or allowances considered after five days of receipt of merchandise." In refusing to stay arbitration in view of this clause, the court said: "It would seem, however, that the arbitration clause which reads in part: 'any controversy or claim arising out of or relating to this contract or the breach thereof shall be considered by arbitration' is broad enough to cover the controversy in issue. Petitioner's claim should be asserted before the arbitrator." *Rhea Manufacturing Co. v. Associated Lace Corporation*, N.Y.L.J., May 3, 1947, p. 1735, Hofstadter, J.

Cross Claims Against Impleaded Defendant as an Arbitral Issue. A seller of merchandise who was sued for breach of warranty impleaded his seller pursuant to Sec. 193A Civ. Prac. Act and demanded judgment if he should be found liable to the purchaser. This situation was not considered an actually existing controversy between the defendant seller and the impleaded defendant, whereby the latter would be entitled to stay court action against him pending arbitration pursuant to the arbitration clause in the sales contract with his buyer. Said the court: "The term controversy implies a situation in which something is asserted on one side and denied on the other (*Matter of Webster v. Van Allen*, 217 App. Div., 219, 221; see also *Johnson v. Flynn*, 248 App. Div. 649)." Thus, the impleaded original seller may not stay proceedings in view of his contract (with arbitration clause) since his buyer does not claim that warranty has been breached and hence there is no arbitral question between it and the original seller. *Puritan Fabrics, Inc. v. Charm Togs, Inc.*, N.Y.L.J., April 2, 1947, p. 1282, Walter, J.

Parties' Disagreement to Appoint Umpire does not Constitute Triable Issue but Court will Direct Appointment. Under Sec. 1450 Civ. Prac. Act (Remedy in case of default) only two issues may be tried: 1) whether an agreement to arbitrate was made and 2) whether there was a failure to proceed with the obligation to arbitrate. Hence a motion for a jury trial was denied where the parties to a sales contract of standing timber agreed that the contract provides for arbitration and that they had appointed a representative as arbitrator but had failed to agree upon an umpire pursuant to the terms of the contract. The court ordered that in case the two representatives of the parties failed to appoint an umpire within twenty days, then the Dean of

the New York State School of Forestry shall select an umpire. *Matter of Balsam Lake Club*, N.Y.L.J., February 27, 1947, p. 793, Hill, J.

Court Action not Necessarily a Waiver of Arbitration. A party to an arbitration agreement denied the making of an alleged oral agreement upon which a claim was based. When this oral agreement was later dropped as a basis of the claim and the claimant relied on a previous agreement containing an arbitration clause, the prior action of the defendant was not considered a waiver of right to demand arbitration, and a motion for a stay pending arbitration was granted. *Bischoff v. Green-Kriegsman Paper Co., Inc.*, N.Y.L.J., April 23, 1947, p. 1580, Schreiber, J.

When a defendant in a court action expressly pleaded, as an affirmative defense, that the dispute should be submitted to arbitration, such procedural steps do not constitute a waiver of arbitration (see *Haupt v. Rose*, 265 N.Y. 108; *Matter of Ralph Catino Contr. Co.*, 173 Misc. 239). *Schreiber v. Leavitt*, N.Y.L.J., April 2, 1947, p. 1282, Eder, J.

Fixing of Locality by Administrator under AAA Rules Upheld. Often contracts between parties, while providing for arbitration, do not fix the place thereof. If rules of an association which administers arbitration proceedings are referred to in the contract and those rules provide for the authority of the association to fix the place, such exercise of power would be binding upon the parties. Rule X of the American Arbitration Association provides that if the locality is not designated in the contract or submission, or if within seven days from the date of filing the demand or submission, the parties do not notify the Association of such designation, "it shall have power to determine the locality and its decision shall be final." This Rule was recognized by the courts in holding that the parties by referring to the Rules made these Rules a part of the contract and that the determination by the Association "is binding on the parties." *Bradford Woolen Corp. v. Union Knitting Mills*, N.Y.L.J., February 21, 1947, p. 711, Hecht, J., *Bradford Woolen Corp. v. Freedman*, N. Y.L.J., April 11, 1947, p. 1414, Cohalan, J.

Expert Arbitrators may Apply Their Knowledge of Trade Customs. In confirming an award, the court made the following statement: "The arbitration here was conducted before the Flour Committee of the New York Produce Exchange—a committee chosen because its members were expert in the flour business. Plainly, there would be no point in utilizing the services of specialists as arbitrators if they were not to apply the knowledge gained by their experience to the matters which they were required to decide. They were, therefore, acting within their powers when they interpreted the facts in the light of the trade practices and customs of the flour business. There was no necessity for the introduction of evidence as to such customs and trade practices. The arbitrators' determination of damages in accordance with trade practices and customs should not be disturbed." *de Swaan v. Am. Brands Wholesale Corp'n*, N.Y.L.J., May 23, 1947, p. 2039, Hofstadter, J.

Refusal to Grant Second Adjournment does not Constitute Misconduct of Arbitrator. In an arbitration under the Rules of the Association of Food Distributors, because of the failure of the buyer to accept shipping documents

for glucose, the arbitrators refused to grant a second adjournment after the buyer had the first hearing adjourned on the representation that the matter would be adjusted. In the second hearing, the buyer offered no proof, claiming that it was not prepared to go ahead. In view of this refusal to participate, the court held that "there was no misconduct on the part of the arbitrators in refusing to hear evidence under these circumstances" and confirmed the award. *Foreign Commodities Corp'n v. Dalton-Cooper, Inc.*, N.Y.L.J., March 12, 1947, p. 977, Hecht, J.

Requirements for Award in Insurance Policy have to be Observed. A fire insurance policy provided that the amount of loss should be determined by appraisers selected by each party and an umpire to be appointed by the court. The policy further provided that within sixty days after the fire proofs of loss should be submitted to the insurer and that the award should state separately the actual cash value of each item. The amount of loss would be payable sixty days after filing of such award with the company. These conditions were considered precedent to the right to recover on the policy. Said the court: "They make the contract a conditional contract and it is necessary for the plaintiff to allege and prove the performance of such conditions precedent, or to allege and prove a waiver of such performance by the defendant." In an action to recover the awarded sum, the compliance of the award with the provisions of the policy which was contested by the company was therefore to be determined by a trial court. *Mehl v. Patriotic Ins. Co. of America*, 69 N.Y.S. 2d 408.

Definite Identification of Goods Essential to Valid Award. An award, made under the Rules of the National Federation of Textiles, directed certain pieces of paisley to be tendered and delivered; these goods were examined at the hearing after the parties had authorized the arbitrators to inspect the merchandise. An award finding these pieces not defective was confirmed as definite upon the subject matter and the case thus distinguished from *Matter of Albert J. Pfeiffer, Inc.*, 225 N.Y.S. 294, 222 App. Div. 62. There the award called for delivery of a quantity of silk "in accordance with the quality called for by the contracts" and did not identify any particular silk as conforming with the contract. *Forge Mills, Inc. v. Foster Bros. Sportswear, Inc.*, N.Y.L.J., May 13, 1947, p. 1877, Hofstadter, J.

Courts may not Inquire into the Basis of Award in Absence of Fraud. An arbitration award in a partnership dispute was challenged but maintained by the Court of Appeals which stated 296 N.Y. 172, 71 N.E. 2d 454: "The report of the arbitrators' does not appear to be based upon any finding that the contract was induced by fraud on the part of the appellant. Hence we do not reach the question whether the issue as to such fraud was cognizable by the court on the motion to compel arbitration, rather than by the arbitrators. See Matter of *Cheney Bros. v. Joroco Dresses, Inc.*, 245 N.Y. 375, 157 N.E. 272; Matter of *Kahn's Application* (*National City Bank*), 284 N.Y. 515, 523, 32 N.E. 2d 534, 537; *Boudin* v. *Clarren*, 289 N.Y. 724, 46 N.E. 2d 346. In that state of the record there is no warrant for an inference of usurpation of power by them or other abuse of their office. Cf. *Fudickar v. Guardian Mutual Life Ins. Co.*, 62 N.Y. 392, 403, 404; *Bolton v. General Acc.*

Fire & Life Assur. Corporation, 295 N.Y. 734, 65 N.E. 2d 563." A motion for reargument was denied in an opinion wherein the court said: "The record herein was silent as to the basis of the arbitrators' award. This court, by its decision, made no attempt to speculate as to that matter, but held that since the award might have rested on a ground which the arbitrators were competent to consider, other than that of fraud, there was 'no warrant for an inference of usurpation of power by them or other abuse of their office.' " *Behrens v. Feuerring*, Court of Appeals, N.Y.L.J., May 24, 1947, p. 2057.

The method used by an arbitrator in his award in computing the value of machinery, with or without depreciation, is not considered reviewable in a court action to vacate the award. Said the court: "An arbitration award which a party may regard as unfavorable, or which he disapproves, may not be impeached because of the mistake or error of the arbitrator as to the law or facts, in the absence of fraud, corruption or other misconduct (*Matter of Delma Engineering Corp'n (Johnson Cont. Corp'n)*, 267 App. Div. 410, aff'd 293 N.Y. 653; *Matter of Shirley Silk Co. v. Am. Silk Mills*, 257 App. Div. 375; *Matter of Goff & Sons, Inc. v. Rheinauer*, 199 App. Div. 617)." *Berger v. Boretz*, N.Y.L.J., April 15, 1947, p. 1468, Swezey, J.

LABOR-MANAGEMENT

Limitation of Period within which Appeal may be Brought must be Observed. A provision in a collective bargaining agreement provided that "The employer shall have the right to discharge any employee for just cause. Any employee who is discharged shall have the right to appeal his discharge, but notice in writing of such appeal must be given to the employer within three days of such discharge." Such notice in writing was not given with regard to discharge of an employee for causing merchandise to be taken from the plant without official authorization from the company. The union contended that such discharge was not for just cause within the meaning of the above quoted provision. Said the court: "The provision is, in effect, a staute of limitations, and the right to demand arbitration is barred by failure to give the required notice within the time prescribed, unless waived. The union terms this a mere technicality. I disagree. It is more than that. It is a matter of contractual right, and is one of substance. If this provision may be glossed over and ignored, why not any other?" A motion to stay arbitration was therefore granted. *Ketchum & Co., Inc. v. Allied Trades Council*, N.Y.L.J., March 14, 1947, p. 1012, Eder, J.

Arbitration Agreement Expiring after Submission of Dispute Applicable if Arbitrator Acts within Reasonable Time. After a claim was presented to an arbitrator pursuant to the arbitration provision of a collective bargaining agreement, the agreement expired. This expiration, however, did not deprive the arbitrator of the authority to consider the claim if he acted within a reasonable time. Said the court: "His power to act continued until and only terminated with the delivery of the award (*Flannery v. Sahagian*, 134 N.Y. 85)." *Motor Haulage Co., Inc. v. International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, Truck Drivers and Chauffers Local No. 807*, 69 N.Y.S. 2d 656.

Arbitration of Wage Claims under Subsequent Agreement. A collective bargaining agreement provided for the adjustment of grievances whereby final disposition is reserved to an arbitrator of "any controversy or dispute arising over the meaning of the terms of the agreement or concerning conditions of employment established by the agreement." A dispute arose about the right of certain re-employed war veterans to a sum of money which the corporation undertook to pay under an agreement designated "Memorandum of Understanding" (which contained no provision for arbitration). The court, in directing arbitration, said: "Manifestly, the provisions for arbitration are exceedingly broad and most general in scope. They are made applicable, by express mention, to differences relating to 'conditions of employment' and to that unlimited field of controversy which may arise 'over the meaning of the terms of the agreement.' In view of the all embracing character of the arbitration provisions, the court is precluded from passing upon the validity of the petitioner's claim with respect to the agreement which the parties determined was to be construed by an arbitrator." *MacLaren, as president of United Electrical, Radio & Machine Workers of America, Local 441, &c. v. Phelps-Dodge Copper Products Corpn,'*, N.Y.L.J., March 7, 1947, p. 908, Null, J.

Determination of the Right to Strike is one for Arbitrator to Decide. A provision in a collective bargaining agreement which contained a broad arbitration clause including all disputes between the parties, referred to the union's right to declare a strike only "in the event of any violation of this agreement." A motion of the company to stay arbitration was denied with the following holding of the court: "The determination of whether the petitioner violated the agreement is one that rests within the scope of the judgment of the arbitrator. This clause cannot be construed to give the respondent the right to declare unilaterally that there has been a violation of the agreement by the petitioner, and thus automatically invoke the right to strike. If there is a determination of a violation, then that right comes into being. Otherwise, the collective agreement would afford no protection to the petitioner." *Fields Baking Corp'n v. Bakery & Pastry Drivers*, N.Y.L.J., May 6, 1947, p. 1777, Hammer, J.

Sufficient Opportunity to Submit any Evidence must be Afforded Each Party to an Arbitration Proceeding. An arbitrator in a labor-management dispute, after having received evidence by the company, adjourned the hearing on his own motion and held no further hearing. The union had stated to the arbitrator that in the event that he were to deny the motion to discuss the company's defense, predicated upon the testimony offered by the company itself, the union had other witnesses and that it had not gone ahead with its defense at all but wished a ruling on the motion. The award was vacated inasmuch as the arbitrator did not afford "the union any opportunity to submit the evidence which it had stated it wished to offer in the event that its motion was denied. In the circumstances the motion to vacate the award must be granted on the ground that the arbitrator refused to hear the union's evidence and thus predicated his award solely upon the evidence submitted by the company (see subdiv. 3, Section 1462, CPA)." *Industrial Union of Marine & Shipbuilding Workers of America, Local 39, CIO v. Todd Shipyards Corp.*, N.Y.L.J., April 24, 1947, p. 1597, Schreiber, J.

INTER-AMERICAN

Provision for Arbitration in New York under North Carolina Contract is Enforceable in New York Courts. An agreement between a North Carolina buyer of lumber and an Nicaraguan exporter referring to the Rules of the Inter-American Commercial Arbitration Commission provided that "The arbitration shall be held in New York, N. Y." Such agreement is considered a consent to the jurisdiction of New York courts to enforce the contract, pursuant to the cases of *Pohlers v. Exeter Mfg. Co.*, 293 N.Y. 274, and *Wilson v. Seligman*, 144 U.S. 41, 44, cited in *Gilbert v. Burnstine*, 255 N.Y. 348. Arbitration as relating to the remedy and thus constituting part of the procedure is determined by the law of the forum (*Franklin Sugar Refining Co. v. Lipowicz*, 274 N.Y. 465, *Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284, *Berkowitz v. Arbib and Houlberg*, 230 N.Y. 261). Thus, the agreement may be specifically enforced in New York even though it was executed in North Carolina where the statute does not provide for the enforceability of agreements to arbitrate future disputes. Said the court: "The present contract did not provide for an arbitration of future disputes in the State of North Carolina or pursuant to its statutes. The contracting parties, probably in order to obtain apparent advantages under the proposed contract voluntarily agreed to arbitrate under the New York arbitration statute. Such an agreement implies a consent 'without reservation' to carry out such arbitration here. (*Galban Lobo Co. v. Haytian American Sugar Co.*, 271 App. Div. 310, 65 N.Y.S. 2d 1.)" *Gantt (Southland Supply Co.) v. Hurtado & Cie., Ltda.*, N.Y.L.J., March 28, 1947, p. 1210, Church, J., affirmed by App. Div., First Dept., N.Y.L.J., May 17, 1947, p. 1949.

BOOKS AND PUBLICATIONS

Handbook of Procedure and Evidence in Arbitration, by W. T. Creswell and Norman T. Greig, London, Eyre & Spottiswoode, 1946, 275 pp., most useful short treatise on commercial arbitration under British law, appears in its second edition in conjunction with The Institute of Arbitrators with a foreword of the late Lord Almamulree. The booklet deals with the many questions arising in the practice and procedure of arbitration and contains a table of cases and a detailed index.

Waiver of Arbitration—Provision in Contract is the subject of a note by R. P. Davis, in 161 Annotated Law Reports 1426, dealing with the case of *Almacenes Fernandez v. Golodetz*, 148 F. 2d 625.

Jurisdiction—Arbitration—Contract Providing for Arbitration in New York, a note in St. John's Law Review Volume 20 p. 92, comments upon the *Red Line Commercial case*, digested in this *Journal* Vol. 1 p. 89.

Selected List of Materials of Current Interest on Commercial Arbitration, a bibliography which appeared in the Record of the Association of the Bar of the City of New York, vol. 2 p. 46 (1947), is available in reproduction from the American Arbitration Association.

Arbitration of Labor Disputes, by Samuel R. Zack, Doniger & Raughley, Great Neck, New York, 240 pp., $2.50. A collection of arbitration cases many of which were tried over the radio in the compass of an hour's broadcast. A foreword by Herbert H. Lehman and an introduction gives an interesting presentation of some aspects of labor-management arbitration.

Soviet Foreign Trade, by Alexander Baykov, Princeton University Press, Princeton, New Jersey, 100 pp. and Appendix. $2.00; *Russian-American Trade*, by Mikhail V. Condoide, Bureau of Business Research, College of Commerce and Administration, Ohio State University, Columbus, Ohio, 160 pp., $2.50.

Both studies deal with the record of Soviet foreign trade relations during the period between World War I and World War II. They convey interesting data on the place and function of foreign trade in Soviet economic plans. Mr. Condoide's book considers especially the fundamental factors of trade relations to this country and the implication of state trading policies, presenting in summaries documentary data.

Going Abroad for Business, by Edmund B. Besselievre, Reinhold Publishing Corp., New York, 1946. 242 pp. $4.00.

Information on the technique of business transaction abroad especially in the Latin American countries with many practical suggestions for "service abroad."

DOCUMENTATION

INTERNATIONAL AIR TRANSPORT ASSOCIATION

Arbitration Provisions Approved by the General Meeting of IATA, at Cairo, October 1946

Any dispute concerning the scope, meaning, construction or effect of this agreement shall be referred to and finally settled by arbitration.

If the parties agree to the appointment of a single arbitrator the arbitral tribunal shall consist of him alone.

If they do not so agree the arbitral tribunal shall consist of three arbitrators. Each party shall appoint one of the three arbitrators, and the arbitrators so appointed shall appoint the third, who shall act as chairman. Should the arbitrators appointed by the parties fail to agree on the appointment of the third, or should either fail to appoint his arbitrator, any supplementary appointment required shall be made by the Director General of IATA.

The Director General may at the request of either party fix any time limit he finds appropriate within which the other party, or the two arbitrators appointed by the parties, shall constitute the arbitral tribunal. Upon the expiration of this time-limit the Director General shall take the action prescribed in the preceding paragraph to constitute the tribunal.

When the arbitral tribunal consists of three arbitrators its decision shall be given by majority vote.

The arbitral tribunal shall settle its own procedure and if necessary shall decide the law to be applied. The award shall include a direction concerning allocation of costs and expenses of and incidental to the arbitration (including arbitrator fees).

The award shall be final and conclusively binding upon the parties.

INTER-ALLIED REPARATIONS AGENCY

Rules, Chapter VIII: Appeal from Decisions of the Assembly

Article 23

(a) Any decision of the Assembly on the allocation of German reparation shall, subject to the reservation in para. (b) below, come into force at once.

(b) If a Delegate whose Government has submitted a bid for an item which has not been agreed to by the Assembly, has indicated, either by a dissenting vote, or by a motion put forward before the closure of the debate, that he intends to reserve his right to request arbitration, the decision of the Assembly on that item shall not come into force until eight working days after it is taken or until all Delegates whose claims for the item were not agreed to by the Assembly waive their right to request arbitration, whichever date is the earlier.

(c) At any time within that period of eight working days, any Delegate whose claim for the item was not agreed to by the Assembly may request reference of the question to arbitration. Thereupon the President shall immediately grant the request. Such reference shall suspend the effect of the decision of the Assembly on that item.

(d) The Delegate or Delegates who requested such reference may withdraw the request at any time. If all Delegates who requested the reference thus withdraw their request, the decision of the Assembly shall come into force.

ARTICLE 24

The Delegates of the Governments claiming an item referred to arbitration under Article 23 above shall select an Arbitrator from among the other Delegates. If agreement cannot be reached upon the selection of an Arbitrator, the President shall request the Delegate of the United States either to act as Arbitrator or to appoint as Arbitrator another Delegate from among the Delegates whose Governments are not claiming the item. If the United States Government is one of the claimant Governments, the President of the Agency shall appoint as Arbitrator a Delegate whose Government is not a claimant Government. In all cases, the name of the Arbitrator shall be communicated to the Secretary General.

ARTICLE 25

The Arbitrator shall have authority to make final allocation of the item referred to him among the claimant Governments.

The Arbitrator may, at his discretion, refer the item to the Secretariat for further study. He may also, at his discretion, require the Secretariat to resubmit the item to the Assembly.

The Arbitrator shall take action as rapidly as is consistent with the effective fulfilment of his responsibilities. He shall communicate his decision to the Secretary General, who shall inform the Assembly of this decision during its next meeting.

RULES OF PROCEDURE FOR THE ARBITRATION AND CLAIMS COMMISSIONS OF THE CHAMBER OF COMMERCE OF GUAYAQUIL, ECUADOR *

ART. 1. When a member availing himself of Art. 8 of the Statutes requests the Chamber of Commerce of Guayaquil to intervene in a matter which concerns the interest of the petitioner, he shall present his claim in writing to the Secretariat of the Chamber which in turn will immediately bring this matter to the attention of the Chairman of the Claims Commission or to whomever is acting in this capacity. The same procedure shall be followed in the case where a person, natural or juridical, who is not affiliated with the Chamber of Commerce in Guayaquil, presents a claim based upon commercial relations with some member of the Chamber.

* Translated from *Revista de la Cámara de Comercio de Guayaquil*, 1946, n° 435, p. 1.

ART. 2. When the request for intervention by the Claims Commission has been received, it will proceed to notify the party against whom the claim has been made for the purpose of having him submit to arbitration by the Chamber of Commerce.

ART. 3. The notice referred to in the previous article shall be given by means of a communication signed by the titular Secretary or *ad-hoc* of the Commission and shall contain the name of the claimant, the subject matter of the claim, and the hour, day, month and year at which he must present himself before the Claims Commission. The period set for appearance shall not be greater than five days.

ART. 4. If the party against whom the claim is made, has no known domicile, the notification shall be made by publication on three consecutive days in some of the newspapers of greater *circulation* of the city, it being understood that the expenses involved shall be paid by the claimant. However, if the domicile is known, and the party claimed against shall be situated outside of Guayaquil or in a foreign country, the Commission will proceed to make known the claim in question by means of similar Institutions or methods, Consuls or Diplomatic Representatives of Ecuador, etc., according to the case keeping in mind also the necessity for naming a personal representative in Guayaquil or that the party claimed against appear personally in Guayaquil.

In the two aforementioned cases, taking into account distance, a reasonable time for appearance shall be conceded similar to the one in the notice of claim and which shall not exceed 60 days.

ART. 5. If the party claimed against does not appear within the time specified in the foregoing articles, or if making an appearance, he refuses to accept arbitration by the Chamber, the Chamber without further ado shall notify the claimant also by a communication so that within the period of ten days he may present all the proofs which he considers necessary. The claimant may request that the Commission hear him personally within the period set for submission of proofs and likewise without the latter requesting, the Commission can order that he present himself and make available any proofs that he deems important for the clarification of the claim.

ART. 6. When the period for submission of proofs has terminated the Claims Commission shall make known its opinion within 8 days, which opinion shall be submitted for approval to the Executive Council in order that they may examine it.

As soon as the Executive Council has approved the opinion, it shall be immediately brought to the attention of the parties by the Secretariat.

If the opinion is the subject of comment on the part of the Executive Council it shall be returned to the Commission in order that it be rectified or ratified within the period of 8 days which if it has expired shall necessitate the return of the opinion to the Executive Council.

If the Commission shall disagree as to the opinion, the controversy shall be submitted to the decision of a Special Commission to be appointed by General Council of the Chamber of Commerce.

ART. 7. The opinion shall endeavor to establish the facts surrounding the dispute, whether the claimant is right or wrong, and shall determine the measures or penalties which shall be undertaken by the Executive Council

in accordance with the procedure established in Articles 24 and 62 of the Statutes.

ART. 8. If the party who is notified appears before the Claims Commission and declares his intention to submit to arbitration by the Chamber, the Commission shall cease its functions and the Chairman shall turn the matter over to the Arbitration Commission communicating this information to both parties. In this second case, it will not be necessary for the Arbitration Commission to proceed to give any notice to the party claimed against but instead shall limit the notice to both parties so that they may appear at a conciliation hearing which will take place on the date which the Commission designates.

The hearing shall take place as soon as possible after 24 hours have passed since notice has been given to the parties and shall be postponed on at least two occasions at the request of each one of the parties.

ART. 9. In accordance with what has been established under previous articles, the Arbitration Commission only shall act in the case specified in Art. 8 or when the parties by mutual agreement submit themselves directly to it.

ART. 10. Whether the opinion be brought to the Arbitration Commission through the intermediary of the Commission, whether it be submitted directly, in any event, a conciliation hearing shall take place in accordance with the provisions in Art. 8 in which case the Commission through the intermediary of its Chairman, shall try to get the parties to reach a mutual and definitive agreement. Whether the parties reach an agreement or do not conciliate their points of view, the Secretariat of the Commission shall set down in a set of minutes on the points *treated* which shall be signed by the members of the Commission, the parties and the Secretary.

ART. 11. If the parties do not arrive at an agreement in the Conciliation Hearing, in the same act, the Chairman of the Arbitration Commission shall open the matter to submission of proofs within thirty days. At the request of any one of the parties and only once, he shall concede an extraordinary period of fifteen days more for the presentation of proofs which may be of fundamental importance and provided that the petitioner justifies the reason for the period of time. Within this extraordinary period of time, the party who has not made the request shall have the opportunity of presenting new proofs. The petition for an additional period of time only shall be made at a time before the ordinary period of time expires; and if during the procedures one of the parties manifests his decision to withdraw from the arbitration, the Commission shall proceed in the same manner provided for in Art. 57 of these Rules of Procedure.

ART. 12. After the termination of the period of time for submission of proofs the Arbitration Commission shall notify the parties to present further allegations strengthening their points of view allowing them for this purpose a common period of forty-eight hours.

ART. 13. Whether these allegations are in their possession or not, the Arbitration Commission shall render its award within a period of eight days. This award shall contain the antecedents of the question, the reasons which support the contentions of the parties and a just and equitable solution of the matter.

ART. 14. Once the award has been rendered it shall be submitted to the

approval of the Executive Council and as soon as approved by this group, the parties shall be notified by means of authentic copy of the award instructing them that it must be complied with within forty-eight hours.

If the Executive Council shall find criticism of the award, it shall be returned to the Commission for it to rectify or ratify it within a period of eight days, after which it must be returned to the Executive Council. In the event that the Commission confirms its previous award, the difference shall be submitted to the decision of a Special Commission designated by the General Council.

ART. 15. If the Arbitration Commission shall find out, by whatever means at its disposal, that the award has not been complied with within forty-eight hours, after which it has been brought to the attention of the parties, or that it has not been complied with in accordance with the award as described in Art. 13, due to the fault of any one of the parties, it shall immediately communicate this fact at the request of the party to the Executive Council so that this group may impose the sanctions which apply to the case.

ART. 16. The Claims and Arbitration Commissions shall keep a file of all the documents and work done on each case.

ART. 17. The awards dictated by the Arbitration and Claims Commission once approved by the Executive Council or by the Commission of the General Council, in each case, shall be final.

ART. 18. The Commissions to which these Rules of Procedure refer can undertake the adjustment of matters which already are in the process of judicial settlement but without interfering in any way in award procedure. However, it shall abstain from intervening in any matter which has been the subject of an executed judicial sentence.

ART. 19. The Commissions shall be formed in the manner established in Articles 17 and 18 of the Statutes of the Chamber and they can request when they believe it necessary the opinions of the Councilor or Councilors of the Chamber and they shall govern their functions within the disposition of these Rules of Procedure and the Statutes of the Chamber taking into account if applicable the Procedures provided in Art. 68 of the same.